TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 202.

VICENTE SERRA AND MARIA OBLENO, PLAINTIFFS IN ERROR,

vs.

ADRIANO MURTIGA.

IN ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

FILED FEBRUARY 9, 1906.

(20,092.)

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1 Supreme Court of the United States, October Term, 1905.

VICENTE SERRA and MARIA OBLENO, Plaintiffs in Error,
v.
UNITED STATES OF AMERICA, MACARIO MERCADER, and ADRIANO MORTIGA, Defendants in Error.

In Error to the Supreme Court of the Philippine Islands.

Proceedings had in the Court of First Instance of the province of Albay, Philippine Islands, and the Supreme Court of the Philippine Islands.

THE UNITED STATES and MACARIO MERCADER in Behalf of Adriano Mortiga
v.
VICENTE SERRA and MARIA OBLENO.

Be it Remembered: That heretofore, to-wit, on the 24th day of February, 1904, in the Court of First Instance of the province of Albay, Philippine Islands, came Macario Mercader, as attorney in behalf — Adriano Mortiga, and filed in the clerk's office of said court a complaint signed and sworn to by them, against Vicente Serra and Maria Obleno, which complaint is in the words and figures following, to-wit:

"THE UNITED STATES OF AMERICA,
Philippine Islands, Eighth Judicial District:

In the Court of First Instance of Albay.

THE UNITED STATES and MACARIO MERCADER in Behalf of Adriano Mortiga
v.
VICENTE SERRA and MARIA OBLENO.

2 The undersigned, a practicing attorney, in behalf of Adriano Mortiga, the husband of Maria Obleno, accuses Vicente Serra and the said Maria Obleno of the crime of adultery, committed as follows:

That on or about the year 1899, and up to the present time, the accused, being both married, maliciously, criminally and illegally lived as husband and wife, and continued living together up to the present time, openly and notoriously, from which illegal cohabitation two children are the issue, named Elias and José Isabelo, without the consent of the prosecuting witness, and contrary to the statute in such cases made and provided.

(Signed) MACARIO MERCADER,
Attorney at Law.

(Signed) ADRIANO MORTIGA.

Albay, February 24, 1904.
1—202

Sworn and subscribed to before me this 24th day of February, 1904.

(Signed) F. SAMSON, *Clerk.*

Witnesses:
ADRIANO MORTIGA.
BERNARDO MORTIGA.
EULALIO MORTIGA.
PLACIDO SOLANO.
CASIMIRA MARIAS.

Afterwards, to-wit, on the 24th of February, 1904, the defendants Vicente Serra and Maria Obleno were arraigned in said Court of First Instance, before the bar of said court, and pleaded not guilty, and the trial of said cause was set for the 25th of February, 1904.

Afterwards, to-wit, on the 25th of February, 1904, the defendants Vicente Serra and Maria Obleno appeared in the Court of First Instance of the province of Albay, and gave bail for their appearance in said court.

Afterwards, to-wit, on the 25th of February, 1904, the said defendants Vicente Serra and Maria Obleno were tried before the Honorable Arthur F. Odlin, Judge of the Court of First Instance of said province, without a jury, and the following evidence was introduced:

3 ADRIANO MORTIGA, a witness called on behalf of the prosecution, being duly sworn, testified as follows:

Direct examination.

By the COURT:

Q. What is your name?
A. Adriano Mortiga.
Q. Where are you from?
A. From Camalig.
Q. Of this province?
A. Yes sir.
Q. Are you married or single?
A. I am married.
Q. When were you married?
A. On the 25th of May, 1896.
Q. In what town were you married?
A. In Camalig.
Q. Married by the Church?
A. Yes sir.
Q. Have you a marriage certificate?
A. Yes sir.
Q. What is the name of the priest who married you?
A. Father Tortolino.
Q. What is the name of the present priest of Camalig?
A. His name is Iginio Alamo.
Q. What is the name of the woman whom you married?
A. Maria Obleno.

Q. Where is she now?
A. She is here.
Q. How long have you lived together?
A. For over a year.
4 Q. When did you separate from her?
A. After I had lived with her for about a year and a half.
Q. Have you lived with her since?
(No answer).
Q. And you married her in '96, did you not?
A. Yes sir.
Q. And you stopped living with her in '97
A. After '97 I asked my wife to come and live with me, because I intended to live with her, but she refused.
Q. Then Maria has not lived with you since '97?
A. No sir.
Q. Who is she living with now?
A. With Vicente Serra.
Q. Is he present here?
A. Yes sir.
Q. Do they live in the same house?
A. Yes sir.
Q. Where?
A. In Camalig.
Q. How long is it since they have been living together?
A. Since '99.
Q. Five years ago?
A. Yes sir.
Q. With your consent?
A. Not with my consent. I was afraid to bring any judicial proceedings against them because Vicente, in the times of the revolutionary government, was a major to General Paua, in this province, and I was very much afraid of the accused.
Q. When did Paua surrender?
A. Upon the arrival of the American government.
5 Q. It is two or three years ago since Paua ceased to be a chief, is it not?
A. Yes; since the Americans came he ceased to be a chief.
Q. When the Americans came, and when Paua ceased to be a chief, why didn't you complain to the court?
A. Because the accused held an official position under the American government. He was Chief of Police of Camalig.
Q. What has the chief of police got to do with the court?
A. As he was the chief of police I tried to avoid any trouble with him, because he used to go into the mountains armed.
Q. Didn't you have confidence in the judge of Albay?
A. Yes sir, I had.
Q. If you had confidence in the judge of this province, why didn't you present your complaint to him?
A. As the accused continued to hold his office I feared his revenge, but now that he is no longer a public official I have presented my complaint.

Q. Didn't you think that Judge Carson would have protected you against the accused?

A. I thought so, but as he was still the chief of police I avoided any trouble, because I feared that he would have revenge upon me.

Q. I want you to understand that Judge Carson, as well as the present judge, the Honorable Grant Trent, can protect and will protect any person who wishes to file a complaint against any other person.

A. At that time I avoided any possible trouble, because the accused always carried a revolver, and as evidence of this fact I will
6 cite an instance where he went into the mountains and shot a person there.

Q. Does he carry a revolver now?

A. Not now, because he is an ordinary citizen.

Q. Then you knew that your wife had been living with the accused, Vicente, for several years, did you not?

A. Yes sir, since '99.

Q. You state in your complaint that two children have been born as the result of the relations existing between Maria and Vicente; is that so?

A. Yes sir.

Q. How do you know that?

A. I have taken out their certificate of baptism.

Q. (After examining certificates): I see here the name of the mother, but I can not find the name of the father. How do you know that Vicente is the father of Elias, the child?

A. Because Maria Obleno is living in the same house with Vicente Serra.

Q. Can you swear that you are not the father of Elias?

A. Yes sir.

Q. Do you swear that you have not had any intercourse with her since '99?

A. Yes sir.

The COURT: The prosecution may examine the witness.

By the PROSECUTION:

Q. How long have you been living apart from Maria?

A. Since '97.

Q. What was the reason for your separation?

A. The reason for our separation was because I talked to my wife while we were in town, and told her that we had better move to Baligan, where we have a tract of land, and my wife, as well as my mother-in-law, objected very strongly. My mother-in-law
7 gave me twelve lashes with a whip. I insisted, however, but they refused to go with me to Baligan. I then left the house of my mother-in-law and went to Baligan alone.

Q. How long did you and Maria live together as husband and wife?

A. For over a year.

Q. During that time have you had any trouble with your wife?

A. No sir.

Q. Do you know the accused, Vicente Serra?
A. Yes sir.
Q. How long has he been living with your wife?
A. Since '99.
Q. What did you do when you learned that they were living together? Did you consent to it?
A. No sir.

The PROSECUTION: That's all.

Cross-examination.

By COUNSEL FOR THE DEFENSE:

Q. State whether or not it is true that since the accused, Vicente Serra, went to live with his codefendant, Maria Obiena, you knew of it.
A. Yes sir.
Q. Is it not a fact that they have been living together for about four years?
A. Since '99.
Q. Isn't it a fact that they have been living openly together, and that everybody in Camalig knew about it?
A. Yes sir; it was a matter of public knowledge.
Q. Isn't it a fact that you have tolerated this illegal co-
8 habitation of the accused?
A. I consented to it then because the accused was "a man of rank." He was a major.
Q. So that you had knowledge of the illegal relation existing between the accused?
A. During the revolutionary government I apparently consented to it.
Q. That isn't the question: I asked you whether or not you had knowledge of the illicit relations existing between the accused?
A. That was because he was a major at that time. I couldn't do anything to him, but now, of course——
Q. Isn't it a fact that you knew of this illicit relation long prior to that time, and that you were also aware of the fact that it was a grave offense to your honor and reputation, as well as an act punishable by law?
A. Yes sir.
Q. You have stated that you never consented to the illegal cohabitation of the accused. Is it not likewise true that you never opposed it?
A. I always opposed it.
Q. Were you ever opposed to it?
A. Yes sir, but I couldn't make any complaint against the accused at that time, because he was a man of rank.
Q. Why could you not make any complaint against the defendant, Vicente Serra, when he was a public official?
A. I was afraid that he would shoot me.
Q. Were you ever threatened by the accused, Vicente Serra?
A. No, because I always avoided him.

Q. So that your fear was merely apparent, imaginary,
9 was it not?

A. Yes sir. I don't mean to say that the accused ever did anything to me.

Q. You have stated under oath that the accused was married. How do you know that?

A. The whole town of Camalig knows of this fact.

Q. But you personally, how do you know that?

A. I know it because it is a matter of common knowledge that the accused is married.

Q. Then you state that the accused, Serra, is married, because you know that he is?

A. Yes sir.

Q. Were you present at the time the accused was married to his wife?

A. No sir, but as it is a matter of public knowledge in Camalig, I know it too.

Q. You have stated that in '97 you separated from your wife, Maria Obleno: Isn't it a fact that you abandoned her, for good, since?

A. That was exactly the date when we separated, because I asked her to come with me, and she refused to go to the place where I wanted to go.

Q. Isn't it a fact that since that date you and Maria Obleno have lived independently, one from the other?

A. I lived with my parents, and she lived with hers.

Q. Whose parents?

A. Her parents.

Q. So that since then you have lived an independent life have you not?

A. I did not intend to live apart from her, but during the revolutionary government I learned that she had gone to live
10 with her codefendant.

Q. If it was your intention to live together, why did you live apart from her for about three years—that is to say, from '97 to '99?

A. We were not separated for three years. We were only separated for about a year and a half; from '97 to '99; that is over a year.

Q. If your intention was not to live apart from your wife, why did you not join her after that time?

A. Because her parents did not want her to follow me, and I didn't want to live with her parents.

Q. Isn't it a fact that your wife refused to go with you?

A. Yes sir, she did?

Q. How long was Vicente Serra chief of police?

A. Up to the first reconcentration of the people.

Q. In what year, about?

A. When Anacleto Lolano was president.

Q. Is it two or three years ago?

A. It is not quite three years ago. It is about two years.

Q. Two years, eh. When the defendant Vicente ceased to be

chief of police there was no further reason for your fear in presenting your complaint against him. What other reason, if any, did you have for not presenting the complaint?

(No answer.)

COUNSEL FOR DEFENSE. I call the attention of the court to the fact that the witness meditates much before answering my questions, and this may prejudice the interest of my client.

The COURT: Please answer the question.

11 I did not file a complaint then because after he ceased to be a public official he usually carried a revolver.

Q. How long did he continue to carry a revolver?

A. Not very long, because the lieutenant took it away from him.

Q. Why didn't you present your complaint immediately after the lieutenant took his arms away from him, and why did you wait two years before filing your complaint?

A. I left things as they were because this happened at the time of the reconcentration, and the people in Camalig hardly had anything to eat.

Q. When you learned of the adultery of your wife, what impression did it make upon you? Did it make you feel sorry?

The COURT: The question is disallowed.

Q. If you feel sorry——

The COURT: The question is disallowed.

Q. Have you had an opportunity to talk to the accused, Serra, since 1899?

A. No sir.

Q. Have you ever met at the same place?

A. I have seen him at Camalig, but I have never talked with him.

Q. Did your wife consent to be married to you willingly?

(No answer.)

The COURT: The question is disallowed. It is not important.

COUNSEL FOR DEFENSE: That's all.

By the COURT:

Q. What witnesses have you who will testify to the fact that the accused lived together?

A. Eulalio Mortiga.

Q. A relative of yours?

12 A. Yes sir.

Q. Any witness who is not a relative of yours?

A. Placido Solano.

The COURT: Let Placido Solano take the stand.

PLACIDO SOLANO, a witness called on behalf of the prosecution, being duly sworn, testified as follows:

Direct examination.

By the COURT:

Q. What is your name?
A. Placido Solano.
Q. Where do you live?
A. In Camalig.
Q. Your occupation?
A. Farmer.
Q. Are you a relative of Adriano Mortiga?
A. No sir.
Q. Do you know Maria Obleno?
A. Yes sir.
Q. Where is she living now?
A. In Camalig.
Q. In whose house?
A. In my house.
Q. Who is living in the house with her?
A. Her parents.
Q. What are their names?
A. Marta Navarez. Vicente Serra also lives there.
Q. Who is Vicente Serra?
A. This one here (indicating the accused).
13 Q. Why is Vicente living with Maria in the same house?
A. I have seen them living together in the same house.
Q. The two of them?
A. Yes sir.
Q. Both of them living in the same room?
A. Yes sir, in the same house.
Q. Do you know of any relations existing between Vicente and Maria?
A. No sir.
Q. What is the general opinion of the people in town in regard to them?
A. That they live together.
Q. Is there a child in the same house?
A. Yes sir.
Q. What is his name?
A. José. The other one died.
Q. How old is José?
A. He is about a year old.
Q. Who is his mother?
A. Maria Obleno.
Q. Who is his father?
A. Vicente Serra.
Q. How do you know it?
A. Because it is a matter of public knowledge.
Q. And it is considered by the people that Vicente is the father of José?

A. Yes sir.
Q. Does Vicente treat the child as his son?
A. Yes sir.

The COURT: The prosecution may examine the witness.

14 By the PROSECUTION:

Q. How long have you known the accused, Vicente Serra?
A. Since the time of the revolutionary government.
Q. Do you know whether or not he is married to another woman?
A. I know nothing about that.

The PROSECUTION: That's all.

Cross-examination.

By the DEFENSE:

Q. In what year did you become acquainted with the defendant, Vicente Serra?
A. During the time of the revolutionary government.
Q. Can you state the date?
A. I can not. I don't remember.
Q. About when, four years ago? Is it four years ago since you met the defendant Vicente Serra?
A. About four years ago.
Q. Isn't it a fact that when you met him for the first time he was living with his codefendant Maria Obleno?
A. Not at that time.
Q. How long after you had met him did he commence to live with the accused?
A. About a year after.
Q. How long have the defendants been living together?
A. Some four years.
Q. Isn't it a fact that it is well known to the citizens of Camalig that the defendants have been living together as husband and wife?
A. Yes sir.
Q. Isn't it a fact that this was so notorious and public
15 that even her husband knew it?
A. I don't know whether her husband knew of it.
Q. Do you know Adriano Mortiga?
A. Yes sir.
Q. Do you know what sort of a relation existed between Adriano Mortiga and Maria Obleno?
A. The relation of husband and wife.
Q. Is it not true that Adriano Mortiga was not ignorant of the fact that his wife was living with Vicente Serra?
A. I don't know whether he was ignorant of it or not.
Q. What is your belief, that he did or that he did not?
A. He being her husband, it is very probable that he knew it.
Q. Isn't it true that Adriano Mortiga never opposed this union?
A. I don't know anything about that.
Q. Isn't it true that Adriano Mortiga and his wife never had any trouble, notwithstanding the fact that he knew that she was living with another man?

A. I don't know whether they had any trouble or not.
Q. How long did the defendant Maria Obleno live with her husband, Adriano Mortiga?
A. I don't know.

The DEFENSE: That's all.

By the COURT:

Q. Do you know whether or not Adriano and Maria lived together for about a year after they were married?
A. I do not.
Q. Do you know whether Adriano is the true husband of Maria?
A. Yes sir.
Q. How do you know that?
16 A. Because I attended the wedding.
Q. You were living in town when Adriano and Maria were married, were you not?
A. Yes sir.
Q. Where was Vicente on that day?
A. He was not there then.
Q. Was he living in another town?
A. He was not in the town of Camalig.
Q. When did he commence to live in town?
A. During the revolutionary government.
Q. Can you state the year?
A. I don't remember very well.
Q. Did you ever meet Father Tortolino?
A. Yes sir.
Q. When did he, the Father, leave the town?
A. When the revolutionists arrived there.
Q. Did the priest leave the town?
A. Yes sir.
Q. Was it public opinion that Adriano Mortiga was the husband of Maria?
A. Yes sir.

The DEFENSE: If the Court please, I wish to ask a question of the witness.

Q. Vicente was the chief of police, was he not?
A. Yes sir.
Q. How long?
A. For more than six months.
Q. Have you ever seen Vicente and Adriano talking together?
A. No sir, I have not.

The DEFENSE: That's all.

17 The COURT: Let Adriano take the stand.

ADRIANO MORTIGA, recalled.

By the COURT:

Q. Did the defendant Vicente know that you were the husband of Maria?
A. It may be that he did, because everybody in town knew that she was my wife.

Q. After you married did you live with Maria, or did she live alone?
A. She lived with her mother.
Q. Did Maria leave your house and go to her mother's house?
A. Maria always lived with her mother.
Q. Then you left Maria's mother's house, did you not?
A. Yes sir; I asked permission to go and see my hemp fields.
Q. During the time you and Maria lived together, in what house did you live?
A. After we were married we lived in my mother's house, and later went to the house of my wife's mother, and while I was there I asked permission to look after my hemp fields, and she refused to follow me.
Q. Then she remained at her mother's house, did she not?
A. Yes sir.
Q. And is Maria still living at her mother's house?
A. Yes sir.
Q. And does Vicente live with her in the same house?
A. Yes sir.
Q. How long after you left Maria's house did Vicente come in?
18 A. About the latter part of '97 I left the house of the mother of my wife.
Q. And when did Vicente come in?
A. Some time in '99.
Q. Then Maria lived for about a year or more without a husband, without a man?
A. Yes sir. She lived with her parents alone.

The COURT: That's all. Call the witnesses for the defense.

JOSÉ VELOTE, a witness called on behalf of the defense, being duly sworn, testified as follows:

Direct examination.

By the COURT:

Q. What is your name?
A. José Velote.
Q. Where do you live?
A. In Camalig.
Q. What is your occupation?
A. Agriculturalist.

The COURT: Counsel for the defense may examine the witness.

By the DEFENSE:

Q. How long have you lived in Camalig?
A. Since '97.
Q. Prior to that time did you ever live in that town?
A. Yes sir.
Q. How long?
A. For many years; for about twenty years.

Q. How long have you resided in the province?
19 A. I have lived in Camalig for about twenty-seven years.
Q. Do you know the defendants Vicente Serra and Maria Obleno?
A. I do.
Q. Do you know anything about the relations existing between them?
A. Yes sir.
Q. What are they?
A. I think they are living together as husband and wife.
Q. How do you know that?
A. Because they live in the same house.
Q. If they have lived together, as you say, have they had any issue?
A. I think so.
Q. Are you certain of it?
A. Yes sir.
Q. Do you know whether this is known to the people of the town?
A. Yes sir.
Q. Do you know Adriano Mortiga?
A. Yes sir.
Q. Do you know where he is now?
A. Yes sir.
Q. Where?
A. Here in court.
Q. Do you know whether Adriano, the prosecuting witness, knew of the illicit relations existing between the defendants?
A. Everybody knew about it, and I think that he, better than anybody else must have known.
Q. How long have the defendants been living together, to your knowledge?
20 A. Since '99.
Q. How many years have they lived together?
A. For more than four years.
Q. Did Adriano Mortiga consent to it?
A. If from the fact that he allowed it to go on we may infer that he consented, I think that he did.

By the COURT:

Q. You suppose so, is that it?
A. In as much as he never opposed it, I think he did.

By the DEFENSE:

Q. Do you know that Adriano Mortiga was ever opposed to it?
A. I do not.
Q. During the four years that the defendants have been living together has the prosecuting witness, Adriano Mortiga, ever opposed the defendants living together?
A. Not to my knowledge.

Q. State whether or not Adriano Mortiga has ever consented to his wife living with the defendant.

A. I have already answered that question: I have said that if from the fact that he allowed them to do it it might be inferred that he consented, in my opinion he consented to it.

Q. Do you know whether Adriano Mortiga knew that his wife was living with the defendant from the very time they commenced to live together?

A. I think that he did.

Q. Do you know what relations existed between the accused and Adriano Mortiga?

A. I do not.

Q. Are they friends?

A. I do not think they are friends?

Q. Are they enemies?

A. I don't think so.

21 Q. Did you ever see the defendants Serra and Adriano Mortiga together?

A. No sir.

Q. When did Adriano Mortiga separate from his wife?

A. In '96.

Q. Are you sure of that?

A. Yes sir.

Q. Do you know when they were married?

A. I do not, because I was not there prior to '96.

Q. And when you lived there, had they already separated, that is, in June, '96?

A. They were not living together at that time.

Q. That is to say, in June, '96, they were not living together, is that it?

A. Yes sir.

Q. Have you ever seen Adriano Mortiga and the defendant Serra together in any gathering?

A. No sir.

The DEFENSE: That's all.

Cross-examination.

By the PROSECUTION:

Q. Just one question: Isn't it a fact that Adriano Mortiga was very much displeased with the action of his wife?

The COURT: The question is not important: the question is whether the law has been violated or not.

The PROSECUTION: That's all.

The COURT: Let another witness take the stand.

22 MARTA NAVARES, a witness called on behalf of the defense, being duly sworn, testified as follows:

Direct examination.

By the COURT:

Q. State your name.
A. Marta Navares.
Q. Where do you live?
A. In Camalig.
Q. Do you know the defendant Maria Obleno?
A. Yes sir.
Q. What relation are you to her?
A. She is my daughter.

The COURT: The defense may examine the witness.

By the DEFENSE:

Q. What is the present status of Maria Obleno?
A. She is living with Vicente Serra as his wife.
Q. How long has she been living with Vicente Serra?
A. About four years.
Q. Prior to this time has Maria Obleno been molested by any one?
A. Molested? Why?
Q. By somebody?
A. I don't understand the question. Molested?

The COURT: The Court excludes all of the testimony introduced by the defense upon the theory that Adriano, the husband of Maria, may have lost his rights by the lapse of time?
The DEFENSE: Exception.

By the COURT:

Q. Are you the mother of the defendant, Maria?
A. Yes sir.

23 Q. And Adriano is the legal husband of Maria, is ne not?
A. Yes sir.
Q. And after they were married they lived together for some time, did they not?
A. After they were married they never lived together. Never, sir.
Q. Why were they married if they never lived together a single day?
A. No sir. Maria didn't even speak to Adriano.
Q. Were you at the church when they were married?
A. Yes sir.
Q. At what time?
A. One Monday morning.
Q. Did they leave the church together?
A. No sir, they didn't even go to church together.
Q. Didn't they leave the church together?

A. No sir; the woman left the church first.
Q. And Adriano followed?
A. I didn't see him leave the church.
Q. When Maria left the church where did she go to?
A. She went to my house.
Q. And Adriano, where did he go to after he left the church?
A. He also went to my house.
Q. How long did they remain at your house?
A. Some two or three weeks.
Q. Then Adriano lived at your house for two or three weeks as the husband of Maria, did he not?
A. Yes sir.
Q. Both of them lived in the same room, did they not?
A. No sir.
24 Q. Weren't they legally married?
A. Yes, they were married, but the woman did not say a word during the ceremony.
Q. Didn't she sign some document connected with the marriage?
A. I don't know.
Q. Didn't you hear the priest say that they were both joined in wedlock?
A. Yes sir; the priest usually says so.
Q. Then when they lived at your house Maria was the wife of Adriano, was she not?
A. Yes sir, because they talked about marriage.
Q. And both of them lived together for about two or three weeks?
A. Adriano did not live at my house steadily, because he used to go in the morning to Balingan, and sometimes he didn't come back to the house in the evening. Although he was in the house he was considered as a stranger. He never had intercourse with her.
Q. Both of them were married in May, and in the evening Maria slept at your house, did she not?
A. Yes sir.
Q. Did Adriano sleep there too?
A. Yes sir.
Q. Did they sleep together?
A. No, sir.
Q. Why not? If both of them were married why didn't they sleep together?
A. Because the woman didn't want the male to approach her, and notwithstanding the efforts of the latter he couldn't do anything, because she refused to.
25 Q. Maria slept in one room and Adriano in another room, eh?
A. No; they slept in the same room, but Adriano was separated from Maria.
Q. Then they never had a connection, did they?
A. Never.
Q. Is such the custom of the country, or is it contrary to the custom of the country?
A. Well, the custom here is also that the woman have connection

with the man, but Maria was married simply because her father insisted on it.

Q. Is her father living?

A. He is dead.

Q. When did he die?

A. About a year after the Americans entered this province.

Q. When did Vicente commence to live at your house?

A. During the time of the revolutionary government Vicente was not living in my house, notwithstanding the fact that he was engaged to Maria.

Q. When were Maria and Vicente engaged?

A. At the time the Americans entered the province, when they eloped, and went to Santa Cruz de Marinduque.

Q. At the time the relations between Maria and Vicente commenced was her father living?

A. Yes sir.

Q. You have said that Maria married Adriano because she was afraid of her father?

A. Yes sir.

Q. Did she marry against her will?

A. Yes sir.

26 Q. Was Adriano married against his will?

A. I am unable to say, because he had nothing to do with Maria.

Q. You mean to say that Adriano never spoke to Maria?

A. Yes sir; not even for a second.

Q. Why did Adriano marry Maria if he didn't love her?

A. I can not say why.

Q. Do you swear that Adriano never had intercourse with his legal wife?

A. Yes sir.

Q. Are you sure of that?

A. I am.

Q. Isn't that a strange thing?

A. It is, indeed, between people who love each other, but as this couple didn't love each other I see nothing strange in it.

Q. Have you ever heard of a similar case in the Philippine Islands?

A. I know of a case in the same town where a couple was married and separated afterwards, but as the husband was a good man they finally made up again.

Q. But have you ever heard of people married by the Church, who lived as husband and wife in the same house, and never had any sexual intercouse?

A. Yes sir, I have also heard of a case like that in the town of Camalig. After the parties were married they refused to go together, but as the husband was a good man and was kind to his wife, they finally united.

Q. Supposing that no relation existed between Adriano and Maria as husband and wife, do you think that Maria had a right to go and live with another man?

27 A. It seems to me that she has not, but my daughter never considered herself as married to that fellow.

Q. When a girl goes to the church, and they go before the priest, doesn't the woman consider herself married?

A. Certain people get married because their parents so desire, and there are other people who marry of their own accord; that is to say, because they love each other.

Q. When people go to the church and the priest tells them that they are married, is it not a legal marriage, always?

A. Yes, when they love each other it is.

Q. Then the priest has no power to marry two persons who do not love each other, is that it?

A. Certainly he has provided they notify the priest beforehand that they don't love each other.

Q. Were you at the church at the time they were married?

A. Yes sir.

Q. Did the priest ask Adriano whether he was willing to accept Maria as his wife, and did he ask the same question of Maria?

A. Yes sir.

Q. And Maria answered that she did, eh?

A. No sir.

Q. You mean to say that the priest declared them to be husband and wife, notwithstanding the fact that Maria refused to become his wife?

A. She didn't refuse at the ceremony; neither did she assent to it.

Q. Did she consent to go to the church?

A. If she went to the church it was because her father beat her.

Q. Do you mean to say that Maria married him because
28 force was employed? That is to say, because her father compelled her to?

A. Yes sir.

Q. Did Vicente know that Maria and Adriano had been to the church together?

A. It seems that Vicente did not know anything about it, because he arrived long after the marriage.

Q. But didn't everybody in town know about it?

A. I don't know anything about that.

Q. Maria knew that she had been to church, did she not?

A. Yes sir, but it was against her will. She didn't consider herself married.

Q. Has Adriano ever objected to Maria living with Vicente?

A. I can not say that Adriano has consented to it, nor can I say that he has objected to it, because he lives in the town of Camalig, and since Vicente and Maria have been living together he and Vicente have met and talked to each other several times.

Q. Who? Vicente and Adriano have talked to each other in your presence?

A. In the house of my other daughter.

Q. Have you ever heard Vicente talking with Adriano?

A. Yes sir, because whenever there is a dance at the house of Captain Pablo Adriano and Vicente always attend.

Q. What did Adriano say?

A. I saw them talking.

Q. Can you state something about the conversation between them?

A. I can not. I always saw them smiling at each other.

Q. Do you know anything about a divorce between Maria and Adriano?

A. I learned of it when it was all done.

Q. Who asked for the divorce?

A. My daughter Maria, and the deceased Guillermo Nieves was the one who drew up the document.

Q. To whom was the petition addressed?

A. To the presidente, Domingo Valenciano.

Q. President of what?

A. President of Camalig.

Q. The president of the town. What has he got to do with the matter of divorce? Was he a judge, or was he the pope?

A. No sir; he simply transmitted the petition to the Board, and thence to the vicar's office, and thence to Nueva Caceres, where the bishop was.

Q. What was the result of the petition for divorce?

A. I know nothing about the result.

Q. Were you ever informed that the divorce had been granted?

A. The vicar general, an ecclesiastical judge at Nueva Caceres, notified the priest of the town that the divorce had been granted. Two months later notice was received of the final decision, but I don't know what the result was.

The COURT: I desire to ask some questions of Adriano.

ADRIANO MORTIGA, recalled.

By the COURT:

Q. Do you know Maria's mother?

A. Yes sir.

Q. She says that Maria went to the church against her will; that she didn't want to marry you, but she was compelled to by her father?

A. If she hadn't loved me she wouldn't have gone to the church.

Q. The mother also says that you never had any sexual intercourse with her; is that so?

A. Yes sir, we did have.

Q. When, for the first time?

A. After the marriage ceremony.

Q. On what night, the first night?

A. No, the second night.

Q. How long did you live at the house of Maria's parents?

A. For about seven months.

Q. Maria's mother says that you only lived there for about a week.

A. No sir.

Q. Who is right; You, when you say seven months, or your mother-in-law, when she says two weeks?

A. My mother-in-law lies.

Q. It is the custom in the United States for a man and a woman to have sexual intercouse the first night after they get married. What is the custom in the Philippines?

A. That is exactly the custom in this country.

Q. Why was there an exception? Why was there a change of custom in the case of you and Maria?

A. Because the first night there were too many people at the house, and we were in the hall.

Q. But you can swear that you had connection with her the first night?

A. Yes sir.

Q. The mother swears that you never had connection with
31 Maria. Is she mistaken?

A. It may be that she is mistaken.

Q. Do you solemnly swear that you had intercourse with Maria the second night?

A. Yes sir.

The COURT: That's all. Let another witness take the stand.

GREGORIO SANTILLON, a witness called on behalf of the defense, being duly sworn, testified as follows:

Direct examination.

By the COURT:

Q. What is your name?
A. Gregorio Santillon.
Q. Where do you live?
A. In Camalig.

The COURT: The defense may examine the witness.

By the DEFENSE:

Q. Do you know the defendants, Maria and Serra?
A. Yes sir.
Q. Do you know Adriano Mortiga?
A. Yes sir.
Q. What sort of relations exist between Adriano and Maria?
A. Adriano is married to Maria.
Q. Have you seen Maria living with Vicente with the consent of Adriano?
A. Inasmuch as he has left him alone, and everybody in the town of Camalig knows about it, I presume he has.

Q. You don't know that he has given his consent, but
32 you presume that the consent exists?

A. Yes sir.

Q. Have you seen Adriano and Vicente together?
A. Yes sir.
Q. What were they doing?
A. They were together.
Q. When?
A. They were together; that's all I know.

Q. Are they friends or enemies?
A. I don't know whether they are enemies.
Q. How long have you lived in Camalig?
A. Since 1890.
Q. How many years, more or less?
A. Some fourteen years.
Q. How long, to your knowledge, have the accused been living together?
A. Since '99.
Q. Four years, or about?
A. Yes sir.
Q. Is it publicly known there?
A. Yes sir, I think it is, because it has come to my knowledge.
Q. When it came to your knowledge did you ascertain whether it was true or not?
A. Yes sir, I know it, because both defendants had a child.
Q. During the four years that the accused lived together do you know whether the prosecuting witness has objected to it?
A. No sir, not to my knowledge.
Q. Do you know whether or not the prosecuting witness was ignorant of the fact that the defendants were living together?
33 A. I don't think he was.
Q. Do you know whether or not Vicente has been the chief of police?
A. Yes sir, he was.

The DEFENSE: That's all.

By the COURT:

Q. Do you know whether Adriano objects to it at the present time?
A. Yes sir.

The COURT: Let another witness take the stand.

MARIA OBLENO, one of the defendants, called as a witness on her own behalf, being duly sworn, testified as follows:

Direct examination.

By the COURT:

Q. State your name?
A. Maria Obleno.
Q. Where do you live?
A. In Camalig.
Q. Are you one of the defendants in this case?
A. Yes sir.

The COURT: The defense may examine the witness.

By the DEFENSE:

Q. Do you know Adriano Mortiga?
A. Yes sir.

Q. What relationship exists between you and Mortiga?
A. None whatever.
Q. Don't you remember having married him?
A. I do.
34 Q. How long did you live with him?
A. We never lived together because I never recognized him as my husband.
Q. Are you living with him at the present time?
A. No sir.
Q. Why are you living apart from him?
A. Because it was against my will that we were married. I was forced to marry him.
Q. How were you forced to marry him?
A. Adriano's parents asked my parents to have me marry Adriano, and as I desired to obey my parents, I married him, but nevertheless against my will.
Q. When did you separate from Adriano Mortiga?
A. After he had been in my house for several weeks.
Q. From the time you separated from your husband to the time you went to live with Vicente Serra did you receive any support or assistance from your husband?
A. No sir, I never received any support whatsoever since '96, the year in which we separated.
Q. So that since then you have lived apart?
A. Yes sir.
Q. How long have you lived with Vicente Serra?
A. Since '99.
Q. Is it public that you are living with him?
A. Yes sir.
Q. Was your husband aware of it?
A. Yes sir, because he lived in the same town of Camalig.
Q. Were you ever rebuked by him for what you did?
A. No sir.

The DEFENSE: That's all.

By the COURT:

Q. Do you want the Court to believe that Adriano con-
35 sented to your living with Vicente?
A. It seems to me that he has consented, because he lived in the same town and knew all about it.
Q. Before you went to live with Vicente did you ask Adriano's permission?
A. I did not, because I never thought that he was my husband, and I was fully convinced of that.
Q. Then in your opinion the marriage ceremony did not amount to anything?
A. It didn't so far as I was concerned.
Q. Did you sue for divorce later?
A. Yes sir.
Q. If you considered that the marriage ceremony had no legal effect whatever, why did you sue for divorce?

A. I sued for divorce because the Vicoles (native inhabitants of the province) thought that I was married to Adriano, and in order to convince the people that I was a free woman, and that was my opinion, I sued for divorce.

Q. Have you ever had any sexual intercourse with your husband?

A. Never in my life, sir.

Q. Then you went to live with Vicente without saying anything to Adriano?

A. Yes sir.

Q. You thought that Adriano had nothing to do with you, did you not?

A. Yes sir.

Q. Did Vicente ask Adriano for permission to live with you?

A. No sir.

Q. Then there was no consent on the part of Adriano?

36 A. No sir.

Q. Do you pretend to say that there was implied consent?

A. Yes sir, because he didn't file a complaint until now.

Q. From the fact that Adriano failed to file a complaint against you, you inferred that he had consented, did you not?

A. I don't know, sir. I thought I was free.

Q. Then you thought that Adriano's consent was not important, did you not?

A. Yes sir, because I never recognized him as my husband.

Q. Then you thought that you had a right to live with Vicente, irrespective of Adriano's wishes, did you not?

A. Naturally so, because I didn't take him to be my husband.

Q. Then your defense is entirely different than that of your attorney?

(No answer).

Q. Then you pretend to say that you didn't consider him to be your husband, and that he had no control over you?

A. I never thought he was my husband.

Q. Then you thought that you had a right to live with Vicente without Adriano's consent, because you thought that your marriage had no legal force?

A. Yes sir.

Q. And notwithstanding the fact that you thought that the marriage was null, you petitioned for divorce, did you not?

A. I asked for a divorce four years later.

Q. And when your attorney stated that Adriano had given his consent you did not pretend to set up such a defense, did you?

37 A. It seems to me that he did consent, because he lived right there.

Q. But you have already stated that Adriano's consent was of no value to you, and that he had no control over you, because you didn't consider yourself married?

A. Yes sir; I did not recognize him as my husband.

The COURT: The prosecution may examine the witness.

PROSECUTION: That's all.

The COURT: Next witness.
DEFENSE: That's all.
Prosecution rests.
Defense rests.

Afterwards, to-wit, on the 25th day of February, 1904, the following decision was rendered by the Honorable Arthur F. Odlin, judge of the said Court of First Instance of Albay, and filed in the clerk's office:

Decision.

This is a very peculiar case, and shows many things strange to me. The arguments of counsel were very able, but I think that if the defendants were to be acquitted it would be a sad day for the social life of the Philippine Islands. The case is very important, but not difficult, and therefore I shall state my opinion upon the law applicable, as I understand it.

In the first place it is contended that the marriage was not consummated. The husband swears that it was and the wife swears that it was not. The Court must decide between the two con-
38 tradictory statements. Although it is true that Adriano does not seem to be a courageous man, my impression is, from the manner in which he has testified, and his antecedents, that his story of the case is more reasonable than that of his wife. As to the statement of the mother of the defendant Maria, it is very probable —it is even certain that the sexual intercourse, if there was any, took place during the absence of the mother, and being convinced that a man could not live for a long time in the same house with his wife without having sexual intercourse with her, it is not possible to believe the testimony of the wife; furthermore the defendant Maria and her mother testified that Adriano had lived with Maria for a very short time, for about two or three weeks, but Maria's husband testified that they were married in 1896, and did not separate until 1897, and therefore there is a further reason for believing Adriano and not Maria. In the second place the law forbids a complaint for adultery to be filed by a husband who arbitrarily deserts his wife against her will. The case at bar is different. Instead of deserting his wife, Adriano swears that he left the house of the defendant's mother in order to live with her in another house, but that she refused to go with him. This is not therefore desertion. In the third place, the most difficult question in this case is that concerning the consent of the husband. It is true that implied consent exists, and there is reason to believe that the consent actually existed in the case at bar, but Maria's husband has explained his position, and the reasons therefor are very weak, but I can conceive and understand the situation of Adriano. Moreover, let us suppose that Adriano is a coward, and was afraid of Vicente without any cause for it. It is true that he had no reason for fear, but the fact that he was a coward does not deprive
39 him of his rights, and I think that he is within the law in filing his complaint at this time.

Having decided the question of the consummation, also the question of separation and consent, I must observe that there is a further question regarding the guilt of the defendant Vicente, which must be mentioned, and which does not apply to the defendant Maria: That is, that he was aware of the fact that she was married. As to the woman, sometimes she said that she didn't consider herself legally married, and sometimes she said that she intended to secure a divorce. Referring to the defendant Vicente it is not possible to believe that he, living in the same town, did not know that Maria and Adriano were married. As a matter of fact everybody knew that they were married. Both of them were married publicly by the Catholic Church, in the presence of the priest of the town, in 1896, and everybody knew it. It is possible that such a thing could happen in a large city, where a great portion of the inhabitants do not know each other, but I cannot believe that such a thing could occur in a small town like the one in question.

In view of the foregoing, it only remains for the Court to fix the penalty:

The law punishes the crime of adultery with a penalty of not more than six years imprisonment, and not less than two years, four months and one day. There is no necessity of imposing a severe penalty in the case at bar, or the maximum penalty prescribed by law, but the Court can not acquit the defendants upon the proof admitted. Therefore, it is the judgment of this court that Vicente Serra and Maria Obleno are guilty of the crime of adultery, as charged in the complaint, for which they must suffer the penalty of two years four months and one day of imprisonment, and that they each pay one-half of the costs.

Counsel for the defense having announced their intention to appeal to the Supreme Court, the said appeal is hereby allowed upon the filing of a sufficient bond in the amount of $2,000 Philippines currency, for each one of the defendants.

It is so ordered.

(Signed) ARTHUR F. ODLIN,
Judge of the Court of First Instance.

Albay, February 25, 1904.

Afterwards, to-wit, on the 7th day of March, 1904, came counsel for the defendants, and appealed from the judgment in said cause finding the defendants guilty, which said appeal is in the words and figures following, to-wit:

ADRIANO MORTIGA, Plaintiff,
v.
VICENTE SERRA and MARIA OBLENO, Defendants.

Notice of Appeal.

Now come the defendants in the above-entitled cause, through their attorney, and respectively state:

1. That on the 24th day of February, 1904, judgment was rendered by this court convicting the defendants in this case, Vicente Serra and Maria Obleno;

2. That not being satisfied with the said judgment, the defendants hereby give notice of appeal to the Supreme Court of justice.

(Signed) L. & C. IMPERIAL,
Counsel for Defendants.

Albay, P. I., March 7, 1904.

(Endorsed:) Received copy. (Signed) Macario Mercader, Counsel for plaintiff.

41 And afterwards, to-wit, on the 7th day of March, 1904, the following order was made by the Court of First Instance in said cause, which said order is in the words and figures following, to-wit:

ALBAY, *March* 7, 1904.

Approved. The appeal allowed as requested. At this time there appears before me Don Gregorio Santibaños, one of the sureties for appellants, and requests permission to withdraw from his bond. It is ordered that the bond be cancelled after the defendants have been surrendered to the sheriff, and the defendants shall remain in the custody of the sheriff until they give a new bond for two thousand pesos, Philippines currency, each.

(Signed) ARTHUR F. ODLIN, *Judge.*

Afterwards, to-wit, on the 2nd day of June, 1904, the said cause was duly forwarded to the Clerk of the Supreme Court by letter of transmittal, which said letter of transmittal is in the words and figures folowing, to-wit:

ALBAY, *June 2nd,* 1904.

The Clerk of the Supreme Court of the Philippine Islands, Manila.

SIR: I have the honor to forward to you herewith criminal cause No. 680, instituted by Adriano Mortiga against Vicente Serra and Maria Obleno, for the crime of adultery, by virtue of the appeal taken by the said defendants against the judgment of this court rendered therein.

Please acknowledge receipt.

Very respectfully,

(Signed) FELIX SAMSON,
Clerk of the Court of First Instance of Albay.

(Endorsed:) Filed in the Clerk's office of the Supreme Court of the Philippine Islands this 13th day of June, 1904. J. E. Blanco, Clerk, by H. D. McGeorge, deputy, at 10.30 A. M.

41½ Afterwards, to-wit, on the 15th day of July, 1904, the defendants presented their brief in the Supreme Court of the Philippine Islands, accompanied by the following assignment of errors:

First Assignment of Error.

The complaint is null and void because it lacks the essential requisites provided by law.

Second Assignment of Error.

The proof taken at the trial does not show that the defendant Vicente Serra is guilty beyond a reasonable doubt, and the court erred in not acquitting him.

Third Assignment of Error.

The proof taken during the trial does not show that the accused, Maria Obleno, was guilty beyond a reasonable doubt, and the court erred in not acquitting her.

42 Afterwards, to-wit, on the 24th day of March, 1905, the Supreme Court met in public session, and the hearing was announced of case No. 2045, Adriano Mortiga *v.* Vicente Serra *et al*, for adultery. No counsel appeared on behalf of either side. The case was considered as submitted, and taken under advisement.

Afterwards, to-wit, on the 20th of September, 1905, the Supreme Court of the Philippine Islands announced its decision on the merits of the said case, No. 2045, Adriano Mortiga *v.* Vicente Serra and Maria Obeleno, which said decision is in the words and figures following, tō-wit:

UNITED STATES OF AMERICA:

In the Supreme Court of the Philippine Islands.

No. 2045.

ADRIANO MORTIGA
v.
VICENTE SERRA and MARIA OBLENO.

WILLARD, *J.*:

The evidence both for the government and for the defendants proved that the latter had been living together as husband and wife since the year 1899.

Of the assignments of error made by the defendants in this court, the first one to the effect that the husband never made the complaint in the action, is not supported by the record. That record shows that on the 15th day of January, 1904, he signed, swore to and presented to the justice of the peace of Camalig a written complaint.

The record also shows that on the 24th of February, 1904,
43 when the proceedings were remitted by the justice of the peace to the Court of First Instance, another written complaint was presented, signed by his attorney and by himself, and sworn to.

Other objections to the complaint based upon an insufficient statement of the facts constituting the offense can not be considered here, because they were not presented in the court below. (U. S. *v.* Sarabia, 3 Off. Gaz. No. 29.)

The evidence in the case is sufficient to show that the defendant, Vicente Serra, knew that his codefendant was married. They lived together in the same pueblo with the complaining witness. The mother of the defendant Maria, a witness for the defense, testified that when the relations between the defendants commenced, they fled from Camalig to Marinduque.

The principal claim of the defendants is that the husband consented to the adultery. We do not think that this is established by the evidence. The husband testified that he had never consented to these illicit relations, and he stated that on account of the official positions occupied by the defendant Vicente, and for other reasons, he did not commence proceedings in court before 1904, because he feared that such action on his part would place him in a dangerous position. The offense was committed in 1899, during the time of the revolutionary government in Albay. At that time the defendant Vicente was a major under General Paua. When the revolutionary government was overthrown and the American government established, the defendant Vicente was made chief of police of the town of Camalig. After he had ceased to be chief of police he was still accustomed to carry a revolver. About this time also occurred the reconcentration in Albay. We have already held in the case of Gali *v.*

Sahagun, 1 Off. Gaz. 658, that a delay of seven months in
44 presenting a complaint was not sufficient evidence to prove that the husband had consented to the adultery, and in this case, considering the unsettled state of affairs in Albay in 1899, and for some time thereafter, and the authority which the defendant exercised in the town, we do not think it can be said that the failure of the husband to present a complaint proved that he gave such consent to the adultery as is mentioned in the Penal Code.

The penalty which the law provides for this offense committed under the circumstances shown in this case, should have been imposed in the medium grade, and we fix it at three years six months and twenty-one days. The judgment of the court below is modified by imposing that sentence instead of the one imposed by the court below, and with such modification the said judgment is affirmed, with the costs of both instances against the appellants.

Afterwards, to-wit, on the 23rd day of September, 1905, came W. A. Kincaid, counsel for defendants and appellants, and filed the following exception to the decision of the Court, which said exception is in the words and figures following, to-wit:

UNITED STATES OF AMERICA:

In the Supreme Court of the Philippine Islands.

ADRIANO MORTIGA, Plaintiff and Appellee,
v.
VICENTE SERRA and MARIA OBLENO, Defendants and Appellants.

Come now the defendants and appellants, and except to the decision of this court made and entered in this case, and therefore pray the Court to admit the said exception as taken in due form and time.

Manila, September 22, 1905.

(Signed) W. A. KINCAID.

(Endorsed:) Filed in the clerk's office of the Supreme Court of the Philippine Islands this 23rd day of September, 1905. J. E. Blanco, Clerk, by H. D. McGeorge, deputy, at 10.30 A. M.

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Afterwards, to-wit, on the 26th of September, 1905 the Supreme Court adopted a resolution admitting the exception filed by the defendants and appellants against the decision of the said court, which said resolution is in the words and figures following, to-wit:

Report having been made upon the pleading filed by Attorney Kincaid in case No. 2045, Mortiga *v.* Serra *et al.*, for adultery, excepting to the decision of this court rendered in the said cause, it was resolved that the said exception be admitted and allowed as taken in due time and form, and let the same be attached to the record of the case.

Afterwards, to-wit, on the 28th day of September, 1905, the following petition was filed by W. A. Kincaid, counsel for defendants and appellants, asking for a rehearing, which said petition is in the words and figures following, to-wit:

ADRIANO MORTIGA, Plaintiff and Appellee,
v.
VICENTE SERRA and MARIA OBLENO, Defendants and Appellants.

Now come the defendants and appellants in the above-entitled cause, and ask this court to set aside its decision entered in this case on the 20th instant, for the following reasons:

1. Because by the decision of this court the defendants have been required to answer to a criminal charge without notice of the nature and cause of the complaint against them. The complaint in this case does not contain the essential requisites provided by law, and the

defendants, particularly Vicente Serra, have been convicted
46 upon a complaint which charges no crime.

2. Because the defendants have been required to answer a criminal accusation without due process of law.

3. Because the proof shows that the alleged husband of Maria Obleno had consented to the adultery of his wife.

Argument.

Being aware of the fact that according to the opinion of this court a person may be sentenced to death for the crime of murder, without an allegation in the complaint to the effect that the defendant had killed the deceased, and that a man can be called upon to answer for the crime of adultery without an allegation in the complaint to the effect that he knew that the woman was married; also that sections 9 and 10 of General Order 58, when they say that "the information or complaint may be amended in *substance* or *form* without leave of court at any time *before the defendant pleads;* and *thereafter* during the trial as to all matters of *form* at the discretion of the court, when the same can be done without prejudice to the rights of the defendant;" and that "no information or complaint is insufficient nor can the trial, judgment or other proceeding be affected by reason of a defect in a matter of *form* which does not tend to prejudice a substantial right of the defendant upon the merits," and that no distinction is drawn between defects of *form* and *substance,* and that the words "form" and "substance" are synonymous and mean the same thing; in other words that there is nothing substantial in an information or complaint, but that it is purely formal, and that the information or complaint is valid, although it does not allege any of the necessary elements of the crime, unless this court can determine that the substantial rights of the accused have in
47 some way been prejudiced, I do not desire to discuss this point again; but as to the second proposition I desire to enter my most energetic protest against the decision.

Perhaps it has escaped the attention of this court that the judgment in this case practically sentences to death a child of tender age, who can not survive if his parents have to serve three years in the penitentiary.

The complainant in this case lived for many years in the same town with the defendants. Knowing all the while of their relations he permitted them to continue until they had produced two children, one of whom is dead, while the other lives with his parents, in order to suddenly file a complaint against them for adultery.

Undoubtedly when implied consent is proven it has just as much force as express consent.

The complaining witness married the defendant, as he says, on the 25th of May, 1896, and the defendants commenced to live together in 1899. The complainant filed his complaint on the 15th of January, 1904, that is to say, five years later.

I am convinced that if the proof in this case is carefully examined it will appear beyond a reasonable doubt that the prose-

cuting witness impliedly consented to the relations between the defendants.

The law of adultery was promulgated for the purpose of vindicating the honor of the husband, and it was never the intention of the legislator to let him sleep for years, until as the result of the illicit union children be born, and then raise the question
48 under the pretext of vindicating his honor. The complaining witness in this case, when he affirms that he did not file the complaint because he was afraid of the defendant Serra, is not entitled to any credit, because in view of the other evidence introduced, what he says in regard to this matter is not true.

Again, according to most reliable evidence given in this case, the marriage in question was completely abortive, and it can almost be called a nonconsummated marriage, and if the court insists that the lapse of five or six years after the time the husband knows of his wounded honor is not sufficient to presume that he consented, then I wish the court would tell me what is to become of the little child? What blame can attach to this child, who would never have existed if the man who now pretends to vindicate his honor had acted in time? The judgment of this court deprives this child of both parents, and leaves it in a completely helpless situation.

In such cases it seems to me that the court should be inclined to presume the consent of the complainant; that instead of searching for pretexts, such as the statement of the complainant that he was afraid of the accused, in order to absolve him from his negligence, it should look for reasons for presuming consent in order to acquit the defendant.

I desire to call the attention of the court to the fact that such accusations, after the lapse of so many years, have no just motive, but that the object sought is very different from that of the vindication of marital honor, such as the extortion of money from the defendants, or revenge for some offense, real or imaginary.

I can also say, both as an argument and as an example to illustrate the ordinary object of such accusations, that the com-
49 plainant has offered to the undersigned, through an agent of his, to accept a sum of money as a consideration for the withdrawal of the accusation.

This does not appear from the record, but it is a fact well known to all attorneys who have had any experience in criminal cases of this nature. Ordinarily they have no moral or legal purpose.

Wherefore, your petitioner prays that this Honorable Court reexamine the evidence in this case, and acquit the defendants.

Manila, September 28, 1905.

W. A. KINCAID,
Attorney for Defendants and Appellants.

Afterwards, to-wit, on the 30th of September, 1905, the following resolution was adopted by the Supreme Court, denying the motion for a rehearing, which said resolution is in the words and figures following, to-wit:

Report having been made upon a petition presented by attorney Kincaid asking for a rehearing upon the judgment of this court in

case No. 2045, —— —— *vs.* Vicente Serra *et al*, for adultery, resolved that the petition be and the same is hereby denied.

Afterwards, to-wit, on the 4th of October, 1905, the defendants and appellants, through their attorney, W. A. Kincaid, excepted to the resolution of this court denying the motion for a rehearing upon the decision rendered in this case, which said exception is in the words and figures following, to-wit:

50 THE UNITED STATES, Plaintiff and Appellee,
v.
VICENTE SERRA and MARIA OBLENO, Defendants and Appellants.

Now come the defendants and appellants, and except to the resolution of this court denying their motion for a re-hearing upon the decision of this court in this case, and pray the court to allow the said exception to be filed.

Manila, October 4, 1905.

W. A. KINCAID,
Attorney for Defendants and Appellants.

(Indorsed:) Filed in the office of the Clerk of the Supreme Court of the Philippine Islands this 4th day of October, 1905, at 3.45 P. M. J. E. Blanco, Clerk, by H. D. McGeorge, deputy.

Afterwards, to-wit, on the 9th of October, 1905, the following judgment was entered, to-wit:

UNITED STATES OF AMERICA:

In the Supreme Court of the Philippine Islands.

THE UNITED STATES OF AMERICA, Plaintiff and Appellee,
vs.
VICENTE SERRA and MARIA OBLENO, Defendants and Appellants.

Judgment. October 9, 1905. Judgment Book No. 2, Case No. 2045.

The court having regularly acquired jurisdiction for the trial of the above-entitled cause submitted by both parties for decision, after consideration thereof by the court upon the record, its decision and order for judgment having been filed on the 20th of September, A. D. 1905,

By virtue thereof it is hereby adjudged and decreed that the judgment of the Court of First Instance of Albay, dated the 25th of February, 1904, and from which the above-entitled appeal was taken,
be, and the same is hereby affirmed, and the defendants are
51 condemned to three years six months and twenty-one days imprisonment, with costs of both instances, the costs of this court amounting to $12 gold.

It is further ordered that the said cause be remanded to the Court of First Instance for the corresponding effect.

(Signed) BLANCO,
Clerk of the Supreme Court of the Philippine Islands.

Afterwards, to-wit, on the 9th of October, 1905, there was filed in the clerk's office of said court in the above-entitled cause, an exception to the final judgment entered therein, said exception being in the words and figures following, to-wit:

ADRIANO MORTIGA
v.
VICENTE SERRA and MARIA OBLENO.

Now come the defendants and appellants and except to the final judgment entered in this case, and therefore ask this Honorable Court to admit the said exception as filed in due time and form.

Manila, October 9, 1905.

(Signed) W. A. KINCAID,
Attorney for Defendants and Appellants.

(Indorsed:) Filed in the Clerk's Office of the Supreme Court of the Philippine Islands this 9th day of October, 1905, at 3.30 P. M. J. E. Blanco, Clerk, by H. D. McGeorge, deputy.

Afterwards, to-wit, on the 12th of October, 1905, a resolution was adopted by the Supreme Court admitting the exception of defendants and appellants to the final judgment in said cause, which resolution is in the words and figures following, to-wit:

Report having been made upon the exception presented by attorney Kincaid to the final judgment of this court in case No. 2045,
52 —— —— *vs.* Vicente Serra *et al.*, for the crime of adultery, and asking at the same time that the said exception be admitted as filed in due time and form, resolved that the said exception be allowed and filed with the record of this case.

Afterwards, to-wit, on the 12th day of October 1905, there was filed in the Clerk's Office of said court, in the above-entitled cause, a petition for a writ of error, said petition being in the words and figures following, to-wit:

53 In the Supreme Court, Philippine Islands.

ADRIANO MORTIGA, Plaintiff and Appellee,
v.
VICENTE SERRA and MARIA OBLENO, Defendants and Appellants.

Come Vicente Serra and Maria Obleno, defendants and appellants in the above-entitled cause, and represent:

I.

That judgment has been rendered in said cause by which a judgment of the Court of First Instance convicting petitioners for the offense of adultery has been affirmed, and a penalty imposed upon them by the Court of First Instance increased from two years four months and one day of imprisonment, to three years six months and twenty-one days of imprisonment, and they have been convicted of said offense in violation of the Philippines Bill, in that they have not been advised of the nature and cause of the accusation against them, and have been convicted of a criminal offense without due course of law.

II.

Wherefore, petitioners pray that they be granted a writ of error from the Supreme Court of the United States to the Supreme Court of these Islands, with a supersedeas of the judgment, and that
54 upon the execution and approval of a bond in such sum as may be deemed sufficient, conditioned as required by law, they be admitted to bail pending such writ of error, in order that the judgment may be revised by the Supreme Court of the United States upon the assignment of errors presented with this petition.

They also pray that the records of the cause be ordered translated from Spanish to English in conformity with the rule prescribed by the Supreme Court of the United States.

W. A. KINCAID,
Attorney for Petitioners.

Afterwards, to-wit, on the 12th day of October, 1905, there was filed in the clerk's office of said court an assignment of errors in said cause, which said assignment of errors is in the words and figures following, to-wit:

Assignment of Errors.

In the Supreme Court of the United States.

In the Matter of the Petition of VICENTE SERRA and MARIA OBLENO, Plaintiffs in Error,
vs.
ADRIANO MORTIGA, Defendant in Error.

Come Vicente Serra and Maria Obleno and say that in the record and proceedings in the above-entitled case there is manifest error in this, to-wit:

I.

It appears that Vicente Serra and Maria Obleno, after having been convicted by the Court of First Instance of the Philippine Islands for the crime of adultery, and after having been placed in
55 jeopardy of punishment for said crime, by a trial duly and regularly had, and after there had been imposed upon them

by said Court of First Instance the penalty of two years, four months and one day imprisonment, the Supreme Court of the Philippine Islands, upon an appeal of said cause from said Court of First Instance to said Supreme Court, increased the penalty imposed upon them by the said Court of First Instance to three years six months and twenty-one days imprisonment.

II.

It appears that Vicente Serra and Maria Obleno have been convicted of the offense of adultery without having been advised of the nature and cause of the accusation against them.

III.

It appears that Vicente Serra and Maria Obleno have been convicted of the offense of adultery without due course of law.

IV.

It appears that Vicente Serra has been convicted of the offense of adultery on a complaint or information which did not show that he had committed said offense.

V.

It appears that Maria Obleno has been convicted of the offense of adultery upon a complaint or information which did not charge her with the commission of said offense.

VI.

It appears that Vicente Serra and Maria Obleno have been convicted of the crime of adultery after said offense had been pardoned by the prosecutor, the alleged husband of Maria
56 Obleno.

Wherefore, said Vicente Serra and Maria Obleno pray that the judgment of the Supreme Court of the Philippine Islands be reversed and the cause remanded to the said court with instructions to acquit the defendants.

W. A. KINCAID,
Attorney for Plaintiffs in Error.

Afterwards, to-wit, on the 8th day of November, 1905, there was filed in the clerk's office of said court in the above-entitled cause a bond, which said bond is in the words and figures following, to-wit:

UNITED STATES OF AMERICA, *Philippine Islands:*

ADRIANO MORTIGA, Plaintiff and Appellee,
v.
VICENTE SERRA and MARIA OBLENO, Defendants and Appellants.

PHILIPPINE ISLANDS, *Province of Albay:*

Whereas, Maria Obleno, one of the defendants and appellants in the above-entitled cause, has been convicted by the Supreme Court of the Philippine Islands of the crime of adultery, and has been allowed a writ of error from the Supreme Court of the United States to the Supreme Court of the Philippine Islands to have the said judgment reversed; and

Whereas, by virtue of an order made and entered by the Honorable Charles A. Willard, Associate Justice of the Supreme Court of the Philippine Islands, who granted the said writ of error,
57 the defendant Maria Obleno is entitled to her liberty pending such writ of error, upon the execution of a bond in the sum of 5,000 pesos, payable to the defendant in error:

Now, therefore, we, Maria Obleno as principal, and Marta Navares, Santiago Solano and Teodoro Navarrete as sureties, do hereby jointly and severally undertake that the above Maria Obleno will pay the fine that the Supreme Court of the United States may impose upon her, or that she will appear for the judgment of said court, or in the event that the case be remanded for a new trial she will appear before the court to which the case may be remanded, and hold herself amenable to the orders and processes of said court; or if she fails to perform any of these conditions that she will pay to Adriano Mortiga the amount of 5,000 pesos, Philippines currency.

In witness whereof, we have hereunto subscribed our names this 4th day of November, 1905, A. D.

MARIA OBLENO.
MARTA NAVARES.
SANTIAGO SOLANO.
TEODORO NAVARRETE.

PHILIPPINE ISLANDS, *Province of Albay, ss:*

Before me, the undersigned authority, on this date personally appeared Maria Obleno, Marta Navares, Santiago Solano and Teodoro Navarrete, who declared under oath that they are the persons who subscribed the foregoing bond, and that they are worth the amount specified in the undertaking, over and above all just debts, obligations and property exempt from execution.

MARIA OBLENO.
MARTA NAVARES.
SANTIAGO SOLANO.
TEODORO NAVARRETE.

Subscribed and sworn to before me this 4th day of November, 1905.

PABLO FIRAZA,
Clerk of the Court of First Instance and ex-Officio Notary Public, Albay Province, P. I.

[SEAL.]

Approved:
CHARLES A. WILLARD,
Associate Justice Supreme Court of the Philippines.

58 UNITED STATES OF AMERICA,
Philippine Islands, City of Manila, ss:

I, J. E. Blanco, Clerk of the Supreme Court of the Philippine Islands, do hereby certify the above and foregoing to be a true and correct translation of a transcript of the record and proceedings had in case No. 2045, in which the United States of America, Macario Mercader and Adriano Mortiga are plaintiffs, and Vicente Serra and Maria Obleno are defendants, as the same appears from the records and files now remaining in my custody and control.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, in my office at Manila, in the Philippine Islands, this 20th day of December, 1905.

[Seal Corte Suprema, Islas Filipinas.]

J. E. BLANCO,
Clerk of the Supreme Court of the Philippine Islands.

59 Original.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable Judges of the Supreme Court of the Philippine Islands, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the Philippine Islands, before you, or some of you, between Adriano Murtiga, plaintiff and appellee, and Vicente Serra and Maria Obleno, defendants and appellants, a manifest error hath happened to the great damage of the said Vicente Serra and Maria Obleno, as by their complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, we command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second day of January 1906, in the said Supreme Court, to be then and there

held, that the record and proceedings aforesaid being in-
60 spected the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States the Second day of November in the year of our Lord, 1905.

[Seal of Corte Suprema, Islas Filipinas.]

J. E. BLANCO,
Clerk of the Supreme Court
of the Philippine Islands.

The foregoing writ of error is allowed and it shall operate as a supersedeas of the judgment complained of, and upon the execution of a bond by Vicente Serra in the sum of five thousand pesos and by Maria Obleno in the sum of five thousand pesos, payable to the defendant in error, conditioned as required by law, to be approved by me, they shall be respectively entitled to their liberty pending such writ of error.

CHARLES A. WILLARD,
Associate Justice of the Supreme Court
of the Philippine Islands.

Filed in the Clerk's office of the Supreme Court of the Philippine Islands this 2 day of Nov. 1905.
8.15 a. m.

J. E. BLANCO, *Clerk,*
By H. D. McGEORGE,
Deputy.

61 THE UNITED STATES OF AMERICA, *ss:*

To Adriano Murtiga, Defendant in error:

You are hereby cited and admonished to be in and appear at the Supreme Court of the United States, to be holden at Washington, within sixty days from the date of this citation, pursuant to a writ of error filed in the clerk's office of the Supreme Court of the Philippine Islands, wherein Vicente Serra and Maria Obleno, are plaintiffs in error and Adriano Murtiga defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this second *Nov.* day of November in the year of our Lord 1905.

CHARLES A. WILLARD,
Associate Justice of the Supreme Court
of the Philippine Islands.

I admit the receipt of a copy of the above citation and accept service thereof as though regularly had this 6 day of Nov. 1905.

FELIX TERRES CASCUAT,
Attorney of Defendant in Error.

Filed in the Clerk's office of the Supreme Court of the Philippine Islands this 8th day of November, 1905.

J. E. BLANCO, *Clerk.*

62 UNITED STATES OF AMERICA, *Philippine Islands, ss:*

In obedience to the foregoing writ of error, I herewith transmit to the Supreme Court of the United States a true and complete transcript in English of the record and proceedings in the foregoing-entitled cause, this 20th day of December, 1905.

[Seal Corte Suprema, Islas Filipinas.]

J. E. BLANCO,
Clerk of the Supreme Court of the Philippine Islands.

Endorsed on cover: File No. 20,092. Philippine Islands Supreme Court. Term No. 202. Vicente Serra and Maria Obleno, plaintiffs in error, *vs.* Adriano Murtiga. Filed February 9th, 1906. File No. 20,092.

FILE COPY.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

Office Supreme Court, U. S.
FILED.
JAN 29 1907
JAMES H. McKENNEY,
CLERK.

No. 202.

VICENTE SERRA AND MARIA OBLENO,
PLAINTIFFS IN ERROR,

vs.

ADRIANO MURTIGA.

IN ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

BRIEF FOR PLAINTIFFS IN ERROR.

ALDIS B. BROWNE,
ALEXANDER BRITTON,
MAURICE KELLY,
Counsel for Plaintiffs in Error.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 24990

SUPREME COURT OF THE UNITED STATES.

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No. 202.

VICENTE SERRA AND MARIA OBLENO,
PLAINTIFFS IN ERROR,

vs.

ADRIANO MURTIGA.

IN ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

BRIEF FOR PLAINTIFFS IN ERROR.

Statement.

This case is brought here by writ of error to the Supreme Court of the Philippine Islands (Rec., 36) to review the judgment of that court (Rec., 31) affirming the judgment of the Court of First Instance of the Province of Albay (Rec., 23-24) convicting Vicente Serra and Maria Obleno, the plaintiffs in error, of the crime of adultery.

The complaint under which these plaintiffs in error were tried and convicted is as follows (Rec., 1):

"THE UNITED STATES OF AMERICA,
"Philippine Islands, Eighth Judicial District:

"IN THE COURT OF FIRST INSTANCE OF ALBAY.

"THE UNITED STATES and MACARIO MERCADES, in "Behalf of ADRIANO MORTIGA,
"*v.*
"VICENTE SERRA and MARIA OBLENO.

" The undersigned, a practicing attorney, in behalf " of Adriano Mortiga, the husband of Maria Obleno, " accuses Vicente Serra and the said Maria Obleno " of the crime of adultery, committed as follows:

" That on or about the year 1899, and up to the " present time, the accused, being both married, ma- " liciously, criminally, and illegally lived as husband " and wife, and continued living together up to the " present time, openly and notoriously, from which " illegal cohabitation two children are the issue, " named Elias and José Isabelo, without the consent " of the prosecuting witness, and contrary to the stat- " ute in such cases made and provided.

"(Signed) MACARIO MERCADES,
"Attorney at Law.
"(Signed) ADRIANO MORTIGA.

"ALBAY, *February* 24, 1904.

"Sworn and subscribed to before me this 24th day " of February, 1904.
"(Signed) F. SAMSON, *Clerk.*

" Witnesses:
" ADRIANO MORTIGA.
" BERNARDO MORTIGA.
" EULALIO MORTIGA.
" PLACIDO SOLANO.
" CASIMIRA MARIAS."

On the same day on which this complaint was filed plaintiffs in error were arraigned in the Court of First Instance

and pleaded not guilty (Rec., 2). After trial had, the Court of First Instance found defendants (plaintiffs in error) guilty, judgment being rendered as follows (Rec., 24):

> "It is the judgment of this court that Vicente Serra and Maria Obleno are guilty of the crime of adultery, as charged in the complaint, for which they must suffer the penalty of two years, four months, and one day of imprisonment, and that they each pay one-half of the costs."

Thereafter plaintiffs in error appealed to the Supreme Court of the Philippine Islands, assigning, among other errors, that—

> "The complaint is null and void because it lacks the essential requisites provided by law" (Rec., 25-26).

The Supreme Court of the Philippines affirmed the judgment of the Court of First Instance so far as it convicted the accused of the crime of adultery, modifying it, however, as respects the sentence by increasing the sentence imposed to three years and six months for each of the defendants (Rec., 27, 31). The court refused to consider the objections raised as to the sufficiency of the complaint in matters of substance, saying (Rec., 27):

> "Objections to the complaint based upon an insufficient statement of the facts constituting the offense cannot be considered here, because they were not presented in the court below."

Thereafter the accused prayed a rehearing, alleging among other reasons therefor (Rec., 28-9):

> "1. Because by the decision of this court the defendants have been required to answer to a criminal charge without notice of the nature and cause of the complaint against them. The complaint in this case does not contain the essential requisites provided by

law, and the defendants, particularly Vicente Serra, have been convicted upon a complaint which charges no crime.

"2. Because the defendants have been required to answer a criminal accusation without due process of law."

Petition for rehearing was denied by the Supreme Court of the Philippines and judgment entered as of date October 9, 1905 (Rec., 31). Upon this judgment the pending writ of error was sued out.

Specification of Errors.

I.

The Supreme Court of the Philippine Islands erred in affirming the judgment of the Court of First Instance of Albay adjudging Vicente Serra and Maria Obleno guilty of the crime of adultery, said persons having been arraigned, tried, and convicted without being informed of the nature and cause of the accusation against them, in violation of the provisions of the sixth amendment to the Constitution of the United States, and of section 5 of the act of Congress approved July 1, 1902, chapter 1369.

II.

The Supreme Court of the Philippine Islands erred in affirming the judgment of the Court of First Instance of Albay adjudging Vicente Serra and Maria Obleno guilty of the crime of adultery, said persons having been held to answer to a criminal offense and deprived of liberty without due process of law, in violation of the provisions of section 5 of the act of Congress approved July 1, 1902, chapter 1369, and of the Constitution of the United States.

III.

The Supreme Court of the Philippine Islands erred in affirming the judgment of the Court of First Instance of Albay adjudging Vicente Serra and Maria Obleno guilty of the crime of adultery, the complaint upon which such judgment of conviction is based being defective in substance, in that it fails to state an essential element of the crime of adultery, to wit, that the accused man, said Vicente Serra, knew that the accused woman, said Maria Obleno, was married at the time the alleged acts of adultery were committed.

IV.

The Supreme Court of the Philippine Islands erred in affirming the judgment of the Court of First Instance of Albay adjudging Vicente Serra and Maria Obleno guilty of the crime of adultery, the complaint upon which said judgment of conviction is based being defective in substance, in that it fails to allege any place where the alleged acts of adultery were committed, or to show that such acts were committed at any place within the jurisdiction of the court.

V.

The Supreme Court of the Philippine Islands erred in holding that they could not consider objections that the complaint did not state facts constituting the crime of adultery, because such objections were not presented in the court below.

ARGUMENT.

Before proceeding to the discussion of the particular questions of law, in the decision of which we claim the court below erred, we think it proper to state some of the general provisions of the Philippine laws relative to criminal procedure, and particularly with reference to the prosecution of "private crimes." The offense of adultery, under the Spanish law and under the law now in force in the Philippines, comes within that class of offenses designated as private crimes—*i. e.*, offenses which are regarded by the Spanish law as wrongs against private individuals rather than against the public peace or welfare, which may be pardoned by the individual who is wronged and which can be prosecuted only by him. While such offenses are punishable by imprisonment, pecuniary indemnification of the person wronged is also provided for. Crimes of this nature are treated by the Penal Code as distinct from public offenses, and are prosecuted upon complaint, while public offenses are prosecuted upon information.

General Orders No. 58, of April 23, 1900 (Phil. Pub. Laws, vol. I, pp. 1083-1095), amending the Code of Criminal Procedure, contains the following provisions with reference to the prosecution of public offenses and private crimes:

> "SEC. 2. All prosecutions for public offenses shall be in the name of the United States against the person charged with the offenses.
>
> "SEC. 3. All public offenses triable in courts of first instance or in courts of similar jurisdiction, now established or that hereafter may be established, must be prosecuted by complaint or information.
>
> "SEC. 4. A complaint is a sworn written statement made to the court or magistrate that a person has been guilty of a designated offense.
>
> "SEC. 5. An information is an accusation in writing charging a person with a public offense, presented

and signed by the promoter fiscal or his deputy and filed with the clerk of the court.

"SEC. 6. A complaint or information is sufficient if it shows:

"1. The name of the defendant, or, if his name cannot be discovered, that he is described under a fictitious name, with a statement that his true name is unknown to the informant or official signing the same. His true name may be inserted at any stage of the proceedings instituted against him, whenever ascertained.

"2. The designation of the crime or public offense charged.

"3. The acts or omission complained of as constituting the crime or public offense in ordinary and concise language, without repetition, not necessarily in the words of the statute, but in such form as to enable a person of common understanding to know what is intended and the court to pronounce judgment according to right.

"4. That the offense was committed within the jurisdiction of the court and is triable therein.

"5. The names of the persons against whom, or against whose property, the offense was committed, if known."

* * * * * * *

"SEC. 9. The information or complaint may be amended in substance or form, without leave of court, at any time before the defendant pleads; and thereafter, during the trial as to all matters of form, at the discretion of the court, when the same can be done without prejudice to the rights of the defendant.

"SEC. 10. No information or complaint is insufficient nor can the trial, judgment, or other proceedings be affected by reason of a defect in matter of form which does not tend to prejudice a substantial right of the defendant upon the merits."

* * * * * * *

"SEC. 107. The privileges now secured by law to the person claiming to be injured by the commission of an offense to take part in the prosecution of the

offense and to recover damages for the injury sustained by reason of the same shall not be held to be abridged by the provisions of this order; but such person may appear and shall be heard either individually or by attorney at all stages of the case, and the court upon conviction of the accused may enter judgment against him for the damages occasioned by his wrongful act. It shall, however, be the duty of the promoter fiscal to direct the prosecution, subject to the right of the person injured to appeal from any decision of the court denying him a legal right."

In the case of *Gibbs vs. McDougal,* the Supreme Court of the Philippines, in decisions dated May 19 and November 20, 1903, held that the crime of adultery could only be prosecuted upon complaint of the injured husband or wife, and that the Government could not take part in the prosecution, saying by Mr. Chief Justice Arellano:

"(2) Whether the Government is entitled or not to take part in this case.

"The principal question on the merits cannot be taken into consideration by this court because it has not yet been considered by the court *a quo*. A matter which has not been passed upon in the trial court cannot be brought into issue or decided in the appellate court. The court below did nothing more than to refuse to allow the filing of the petition of the 4th of November, in which a motion was made for the dismissal of the case because the judge was of the opinion that it did not comply with the requirements of G. O., 58.

"With respect to the questions of form, the only issues which can now be decided—the one with respect to the capacity of the solicitor general to take part in this case—must be passed upon before going into the motion brought by him, and consequently the court must first decide this point.

"The solicitor general is without capacity to intervene in cases of this class. The rule laid down by the Penal Code is explicit: 'No penalty shall be imposed for the offense of adultery except upon the

complaint of the injured husband.' This is one of the crimes of an essentially private character which cannot be prosecuted in accordance with the precepts of the Penal Code except at the instance of the party aggrieved, and this is an offense most essentially of a private character because it cannot be prosecuted except upon the complaint and formal instance of a single person."

* * * * * * *

"Even with respect to private crimes which the Penal Code separates from public actions, there can be no other form of procedure than that contained in general order 58. This has been demonstrated by not a few cases which have been prosecuted for crimes against chastity and honor and brought to a final termination without objection. No objection was raised, nor could it have been raised, that these cases were not properly commenced because of the lack of an information—a formal accusation which pertains to the prosecuting officers alone—because in all of them there has been an accusation adequate to the private action and recognized in the new procedural law, to wit, the complaint. The complaint was defined and regulated on identical terms with the information, and in order that it might serve as a basis for a prosecution and in order to distinguish it from the form reserved for the action of public prosecuting officers, the concept of public crimes, which implies the necessity of an information, was purposely omitted. The complaint is therefore a mode of action which is the auxiliary of the information with respect to public offenses and is the principal and sole means of prosecution with respect to private crimes."

The foregoing decisions are not reported, but the cause (No. 42, October term, 1905) was before this court on writ of error at the last term, and the decisions are set forth in the printed transcript of record therein at pages 17 and 19.

In an opinion rendered August 5, 1903, the Attorney Gen-

eral of the Philippines said (1 Att'y Gen'l's Op., Phil., 651, 652):

> "'(3) Can the provincial fiscal take action in private crimes, such as adultery, slander, and calumny?'
> "This question was authoritively determined by the Supreme Court of the Philippine Islands in the case of *United States vs. Gibbs* and *MacDougall*. In said case the court decided that private crimes are to be prosecuted, if at all, by the private attorney of the aggrieved parties, and that the fiscal should not take part in such proceedings."

And this is in accordance with Spanish law and authority. In commenting upon article 449 of the Reformed Penal Code of Spain of 1870, which corresponds to article 433 of the Philippine Penal Code, Escriche says (Dic. de Leg. y Jur., Ed. 1874, Tomo I, fol. 324, tit. Adulterio):

> *"Acerca de la persona que puede acusar á los adulteros, de que se hace cargo el autor en el párrafo 9° de este articulo, el nuevo Código penal ha ratificado lo prescrito por la ley 4, tit. 26, lib. 12 de la Nov. Recop., que solo concedia esta accion al marido. Segun el art. 449 del Código penal reformado de 1870 no se impone pena por el delito de adulterio, sino en virtud de querella del marido agraviado; en los arts. 4 y 6 de la ley provisional de Enjuiciamiento criminal de Setiembre de 1872 se ratifica esta disposicion, la cual se funda en que, si bien los delitos de sensualidad, y en especial el de adulterio, como atentatorios contra la severidad de las costumbres, que es uno de los vinculos mas fuertes de los familias y de la sociedad, deben ser castigados por el legislador, la ley social debe penarlos solamente cuando se cometen con perjuicio de tercero, dejando á este la facultad de reclamar su castigo y de hacerlos publicos; mas no en el caso contrario y cuando permanezcan en secreto, porque la acusacion publica y las diligencias para averiguar su perpetracion abririan el santuario del hagar deméstico y someterian la vida privida y las acciones intimas á procedimientos que perjudicarian á la moral y al buen ejemplo. Asi, pues, cuando el*

inmediatamente interesado en su castigo no se presenta á promoverlo, el legislador ha dejado la reprobacion y penalidad de tales delitos á la conciencia y la honestidad publicas y al juicio justo y severo de la Divinidad."

The provisions of the Philippine Penal Code relative to the crime of adultery are contained in Chapter I of title IX, articles 433 to 437, inclusive, and are as follows:

"ART. 433. Adultery shall be punished with the penalty of *prisión correccional* in its medium and maximum degrees.

"Adultery is committed by a married woman who lies with a man not her husband, and by him who lies with her *knowing that she is married,* although the marriage be afterwards declared void.

"ART. 434. No penalty shall be imposed for the crime of adultery except upon the complaint of the aggrieved husband.

"The latter can enter a complaint against both guilty parties, if alive, and never, if he has consented to the adultery or pardoned either of the culprits.

"ART. 435. The husband may at any time obtain the remission of the punishment imposed upon his wife.

"In such case the adulterer's penalty shall also be considered as remitted.

"ART. 436. The final judgment rendered in a suit for divorce on the ground of adultery shall have full effect as to penal consequences, if it absolves the respondents.

"If the judgment is condemnatory of the respondents, however, a new proceeding shall be necessary in order to impose penalties upon them.

"ART. 437. The husband who shall keep a concubine in his home, or out of it with scandal, shall be punished with the penalty of *prisión correccional* in its minimum and medium degrees.

"The concubine shall be punished with banishment.

"The provisions of articles 434 and 435 are applicable to the case referred to in this article."

From the foregoing provisions of the Penal Code it will be seen that there are two separate and distinct crimes defined under the general head of adultery.

(1) That defined by article 433—*i. e.*, the carnal intercourse of a man with a married woman not his wife, the man knowing the woman to be married at the time of the act; and of a married woman with a man not her husband. It is immaterial to the commission of this offense whether the guilty man be married or not; to sustain conviction, however, the man must know when he commits the act that the woman is married. The parties guilty of this offense can only be prosecuted by the injured husband, and each is subject to like punishment.

(2) That defined by article 437—*i. e.*, the cohabitation of a married man with a woman not his wife, in his own home, or outside of it with scandal. The man and his concubine are both guilty, but are punishable in different ways—the man by *prisión correccional* in minimum or medium degree, the concubine by banishment. It is immaterial to this offense whether the guilty woman be married or not. It is, of course, essential that the man be married, and the cohabitation must be either in the man's home, or if not in his home it must be accompanied by scandal. Prosecution of this offense must be by the injured wife. It is at once apparent that this crime is not the one for which plaintiffs in error have been prosecuted and of which they have been convicted, since the complaint in this case is made by an alleged injured husband—not an injured wife; there is no allegation that Serra lived with Señora Obleno in his own home, nor that he lived with her out of his home with scandal; and the punishment to which Señora Obleno has been sentenced is imprisonment, not banishment.

It is hence clear that the crime of which plaintiffs in error have been convicted and for which they are under sentence is that defined by article 433 of the Penal Code.

I.

First and Third Specifications of Error.

The complaint herein fails to state the essential elements of the crime of adultery, and is hence fatally defective. In entering judgment of conviction thereon, the court below violated the fundamental guarantees of the Constitution and of the Philippine Bill of Rights.

Article 433 of the Philippine Penal Code, *supra,* makes the knowledge by the male defendant of the fact that his female codefendant was married an essential element of the crime.

> "Adultery is committed by the married woman who lies with a man not her husband, and by him who lies with her *knowing that she is married.*"

Unless, when the man lies with the woman, he knows her to be married, he has not committed the crime of adultery; and unless the complaint states that the man lay with the woman, knowing her to be married, it does not charge the crime of adultery. Inspection of the complaint, *ante,* page 2 (Rec., 1), at once discloses that it nowhere, directly or indirectly, formally or informally, states that the defendant Serra knew that his codefendant, Señora Obleno, was married, either at the time of the acts complained of or at any other time. The charging part of the complaint is as follows:

> "That on or about the year 1899, and up to the present time, the accused, being both married, maliciously, criminally and illegally lived as husband and wife, and continued living together up to the present time, openly and notoriously, from which

> illegal cohabitation two children are the issue, named Elias and José Isabelo, without the consent of the prosecuting witness, and contrary to the statute in such cases made and provided."

The complaint, failing to charge this essential element in the crime of adultery, is defective in its substance—fatally defective—and it cannot support any valid conviction.

It is fundamental law, in prosecutions for either statutory or common-law offenses, that the indictment, information, or complaint must set forth clearly and accurately every "element necessary to constitute the offense intended to be punished"—"all the ingredients of which the offense is composed." An indictment, information, or complaint which does not so charge every essential element of the offense is defective in substances, is not cured by verdict or judgment, and cannot support a valid conviction. It may be quashed on motion, or judgment thereon may be arrested, or may be reversed on error. This court has repeatedly so decided. Thus in *United States vs. Cook,* 17 Wall., 168, this court said (p. 174):

> "Offenses created by statute, as well as offenses at common law must be accurately and clearly described in an indictment, and if they cannot be, in any case, without an allegation that the accused is not within an exception contained in the statute defining the offense, it is clear that no indictment founded upon the statute can be a good one which does not contain such an allegation, as it is universally true that no indictment is sufficient if it does not accurately and clearly allege all the ingredients of which the offense is composed.
>
> "With rare exceptions, offenses consist of more than one ingredient, and in some cases of many, and the rule is universal that every ingredient of which the offense is composed must be accurately and clearly alleged in the indictment, or the indictment will be bad, and may be quashed on motion, or the judgment may be arrested, or be reversed on error."

And in *United States vs. Cruikshank*, 92 U. S., 542-557, the court, by Mr. Chief Justice Waite, held:

> "In criminal cases, prosecuted under the laws of the United States, the accused has the constitutional right 'to be informed of the nature and cause of the accusation.' Amend. VI. In *United States v. Mills*, 7 Pet., 142, this was construed to mean that the indictment must set forth the offense 'with clearness and all necessary certainty, to apprise the accused of the crime with which he stands charged;' and in *United States v. Cook*, 17 Wall., 174, that 'every ingredient of which the offense is composed must be accurately and clearly alleged.' It is an elementary principle of criminal pleading, that where the definition of an offense, whether it be at common law or by statute, includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species—it must descend to particulars. 1 Arch. Cr. Pr. and Pl., 291. The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place and circumstances.
>
> "It is a crime to steal goods and chattels; but an indictment would be bad that did not specify with some degree of certainty the articles stolen. This, because the accused must be advised of the essential particulars of the charge against him, and the court must be able to decide whether the property taken was such as was the subject of larceny. So, too, it is in some States a crime for two or more persons to conspire to cheat and defraud another out of his property; but it has been held that an indictment for

such an offense must contain allegations setting forth the means proposed to be used to accomplish the purpose. This, because, to make such a purpose criminal, the conspiracy must be to cheat and defraud in a mode made criminal by statute; and as all cheating and defrauding has not been made criminal, it is necessary for the indictment to state the means proposed, in order that the court may see that they are in fact illegal. *State v. Parker,* 43 N. H., 83; *State v. Keach,* 40 Vt., 118; *Alderman v. The People,* 4 Mich., 414; *State v. Roberts,* 34 Me., 32. In Maine, it is an offense for two or more to conspire with the intent unlawfully and wickedly to commit any crime punishable by imprisonment in the State prison (*State v. Roberts*); but we think it will hardly be claimed that an indictment would be good under this statute, which charges the object of the conspiracy to have been 'unlawfully and wickedly to commit each, every, all and singular the crimes punishable by imprisonment in the State prison.' All crimes are not so punishable. Whether a particular crime be such a one or not, is a question of law. The accused has, therefore, the right to have a specification of the charge against him in this respect, in order that he may decide whether he should present his defense by motion to quash, demurrer or plea; and the court, that it may determine whether the facts will sustain the indictment. So here, the crime is made to consist in the unlawful combination with an intent to prevent the enjoyment of any right granted or secured by the Constitution, &c. All rights are not so granted or secured. Whether one is so or not is a question of law, to be decided by the court, not the prosecutor. Therefore, the indictment should state the particulars, to inform the court as well as the accused. It must be made to appear—that is to say, appear from the indictment without going further—that the acts charged will, if proved, support a conviction for the offense alleged."

In *Evans vs. United States,* 153 U. S., 584, Mr. Justice Brown, speaking for the court, thus reviews the authorities (p. 587):

"A rule of criminal pleading, which at one time obtained in some of the circuits, and perhaps received a qualified sanction from this court in United States *v.* Mills, 7 Pet., 138, that an indictment for a statutory misdemeanor is sufficient, if the offense be charged in the words of the statute, must, under more recent decisions, be limited to cases where the words of the statute themselves, as was said by this court in *United States v. Carll,* 105 U. S., 611, 612, 'fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished.' The crime must be charged with precision and certainty, and every ingredient of which it is composed must be accurately and clearly alleged. *United States v. Cook,* 17 Wall., 168, 174; *United States v. Cruikshank,* 92 U. S., 542, 558. 'The fact that the statute in question, read in the light of the common law, and of other statutes on the like matter, enables the court to infer the intent of the legislature, does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that intent.' *United States v. Carll,* 105 U. S., 611.

"Even in the cases of misdemeanors, the indictment must be free from all ambiguity, and leave no doubt in the minds of the accused and the court of the exact offense intended to be charged, not only that the former may know what he is called upon to meet, but that, upon a plea of former acquittal or conviction, the record may show with accuracy the exact offense to which the plea relates. *United States v. Simmons,* 96 U. S., 360; *United States v. Hess,* 134 U. S., 483; *Pettibone v. United States,* 148 U. S., 197; *In re Greene,* 52 Fed. Rep., 104."

In *Cochran and Sayre vs. United States,* 157 U. S., 286, the court, by Mr. Justice Gray, speaking of the rule by which the sufficiency of an indictment must be judged, said (p. 290):

"The true test is, not whether it might possibly have been made more certain, but whether it contains every element of the offense intended to be charged,

> and sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction."

Where knowledge of some fact by the accused is an essential ingredient of the offense and is not implied in the statement of the act itself, that knowledge must be specifically alleged. Thus in *United States vs. Carll,* 105 U. S., 611, the indictment was found under section 5431, United States Revised Statutes, which provides that "every person who, with intent to defraud, passes, utters, publishes, or sells any falsely made, forged, counterfeited or altered security of the United States, shall be punished," etc. The indictment in setting forth the offense followed the words of the statute, and did not allege that the accused *knew* the described instruments to be false, forged, counterfeited or altered. This court held that knowledge on the part of the accused was an essential element of the offense, since without such knowledge there could be no intent. For want of such specific allegation of knowledge, it was held that the indictment was fatally defective, and was insufficient after verdict to warrant judgment thereon, saying by Mr. Justice Gray (p. 612):

> "In an indictment upon a statute, it is not sufficient to set forth the offense in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished; and the fact that the statute in question, read in the light of the common law, and of other statutes on the like matter, enables the court to infer the intent of the legislature, does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that intent. *United States v. Cruikshank,* 92 U. S., 542; *United States v. Simmons,*

96 *id.*, 360; *Commonwealth v. Clifford,* 8 Cush. (Mass.), 215; *Commonwealth v. Bean,* 11 *id.*, 414; *Commonwealth v. Bean,* 14 Gray (Mass.), 52; *Commonwealth v. Filburn,* 119 Mass., 297.

"The language of the statute on which this indictment is founded includes the case of every person who, with intent to defraud, utters any forged obligation of the United States. But the offense at which it is aimed is similar to the common-law offense of uttering a forged or counterfeit bill. In this case, as in that, knowledge that the instrument is forged and counterfeited is essential to make out the crime; and an uttering, with intent to defraud, of an instrument in fact counterfeit, but supposed by the defendant to be genuine, though within the words of the statute, would not be within its meaning and object.

"This indictment, by omitting the allegation contained in the indictment in *United States v. Howell* (11 Wall., 432), and in all approved precedents, that the defendant knew the instrument which he uttered to be false, forged and counterfeit, fails to charge him with any crime. The omission is of matter of substance, and not a 'defect or imperfection in matter of form only,' within the meaning of sect. 1025 of the Revised Statutes. By the settled rules of criminal pleading, and the authorities above cited, therefore, the question of the sufficiency of the indictment must be answered in the negative."

Pettibone vs. United States, 148 U. S., 196, was a prosecution brought under section 5399, United States Revised Statutes, for conspiracy, corruptly and by threats and force to obstruct the administration of justice in a court of the United States. It was held that in order to support the charge of conspiracy it must be shown that those alleged to have conspired had knowledge or notice or information of the pendency of proceedings in the United States court, and in order to support a conviction this knowledge must be specifically averred in the indictment. The Chief Justice, speaking for the court, said (p. 202):

"The confederacy to commit the offense is the gist of the criminality under this section, although to complete it some act to effect the object of the conspiracy is needed. *United States v. Hirsch,* 100 U. S., 33.

"This is a conviction for conspiracy, corruptly and by threats and force to obstruct the due administration of justice in the Circuit Court of the United States for the District of Idaho, and the combination of minds for the unlawful purpose and the overt act in effectuation of that purpose must appear charged in the indictment.

"The general rule in reference to an indictment is that all the material facts and circumstances embraced in the definition of the offense must be stated, and that, if any essential element of the crime is omitted, such omission cannot be supplied by intendment or implication. The charge must be made directly and not inferentially or by way of recital. *United States v. Hess,* 124 U. S., 483, 486. And in *United States v. Britton,* 108 U. S., 199, it was held, in an indictment for conspiracy under section 5440 of the Revised Statutes, that the conspiracy must be sufficiently charged, and cannot be aided by averments of acts done by one or more of the conspirators in furtherance of the object of the conspiracy." * * *

(Page 204:) "The construction that applies to the first branch of section 5399 must be applied to the second, and if it were essential that the person accused should know that the witness or officer was a witness or officer in order to conviction of the charge of influencing, intimidating, or impeding such witness or officer in the discharge of his duty, so it must be necessary for the accused to have knowledge or notice or information of the pendency of proceedings in the United States court, or the progress of the administration of justice therein, before he can be found guilty of obstructing, or impeding, or endeavoring to obstruct or impede the same.

"In *United States v. Bittinger,* 15 Am. L. Reg. (N. S.), 49, it was held that a person is a witness under section 5399 of the Revised Statutes who is designated as such, either by the issue of a subpœna or

by the endorsement of his name on the complaint, but that before any one could be said to have endeavored to corruptly influence a witness under that section, he must have known that the witness had been properly designated as such. *United States v. Kee,* 39 Fed. Rep., 603.

"In *United States v. Keen,* 5 Mason, 453, it was ruled by Mr. Justice Story and Judge Davis, that it was no defense to an indictment for forcibly obstructing or impeding an officer of the customs in the discharge of his duty that the object of the party was personal chastisement, and not to obstruct or impede the officer in the discharge of his duty, if he knew the officer to be so engaged.

"In cases of that sort it is the official character that creates the offense and the scienter is necessary. *King v. Osmer,* 5 East, 304; *King v. Everett,* 8 B. & C., 114; *State v. Carpenter,* 54 Vermont, 551; *State v. Burt,* 25 Vermont, 373; *State v. Maloney,* 12 R. I., 251; *State v. Downer,* 8 Vermont, 424, 429; *Commonwealth v. Israel,* 4 Leigh, 675; *Yates v. People,* 32 N. Y., 509; *Commonwealth v. Kirby,* 2 Cush., 577; *State v. Hilton,* 26 Missouri, 199; *State v. Smith,* 11 Oregon, 205; *Horan v. State,* 7 Tex. App., 183; *Duncan v. State,* 7 Humph., 148; *State v. Hailey,* 2 Strobh. (Law), 73; *State v. Beasom,* 40 N. H., 367.

"This is so whenever knowledge is an essential ingredient of the offense and not implied in the statement of the act itself. Whart., Cr. Pl. & Pr., sec. 164.

"Under section 5398, every person who knowingly and willfully obstructs, resists or opposes any officer of the United States in serving or attempting to serve or execute any mesne process or warrant, or any rule of or order of any court of the United States, may be imprisoned and fined. It was held in *United States v. Tinklepaugh,* 3 Blatchford, 425, that an indictment under this section must distinctly state and charge that a legal process, warrant, etc., was issued by a court of the United States, and was in the hands of some officer of the United States for service who had authority to serve the same, and that after such process was in the hands of the officer for service

some one knowingly and willfully obstructed, resisted or opposed him in serving or attempting to execute the same. And in *United States v. Stowell*, 2 Curtis, 153, it was decided that an averment that the warrant resisted was issued by a commissioner was not good, but the facts constituting the due issue must be recited, and the absence of an averment that the commissioner who issued the warrant was thereto authorized, could not be aided by referring to the court records. *United States v. Wilcox*, 4 Blatchford, 391.

"It seems clear that an indictment against a person for corruptly or by threats or force endeavoring to influence, intimidate or impede a witness or officer in a court of the United States in the discharge of his duty, must charge knowledge or notice, or set out facts that show knowledge or notice, on the part of the accused that the witness or officer was such. And the reason is no less strong for holding that a person is not sufficiently charged with obstructing or impeding the due administration of justice in a court unless it appears that he knew or had notice that justice was being administered in such court."

A fortiori, where the statute itself makes knowledge or intent an essential element of the offense, the knowledge of the accused must be specifically alleged. Thus in *United States vs. Slenker,* 32 Fed. Rep., 691, the court said (p. 694):

"The jury in this case having found a verdict of guilty, the defendant moves the court in arrest of judgment, on the ground that it is not alleged in either count of the indictment that the defendant knew the writings, papers, publications, etc., charged to have been by her deposited in the mail, were of an obscene, lewd, and lascivious character. She is charged in the indictment with unlawfully and knowingly depositing, and causing to be deposited, in the mail, for mailing and delivery, certain obscene, lewd, and lascivious writings, papers, etc., but there is no allegation that she knew the papers, writings, etc., to be lewd, etc.

"The *scienter,* when necessary to be alleged in an

indictment, is matter of substance, and not of form, and its omission is not cured by section 1025 of the Revised Statutes. The district attorney insists that as the indictment is in the language of the statute, it is sufficient. This is the general rule as to sufficiency in describing the offense; but where something more is necessary, such as the allegation of guilty knowledge, then the language of the statute is not always sufficient."

* * * * * * *

"Let us apply this rule to the case before us. The defendant is charged with knowingly depositing, and causing to be deposited, in the mail, for mailing and delivery, certain obscene papers, etc. She may knowingly have done this; she may knowingly have caused it to be done, and yet be entirely ignorant of the obscene character of the writings, etc., so deposited, and consequently not guilty of the offense described in the statute. 'Knowingly,' in the indictment, must be limited to the *act* of depositing, for mailing and delivery, the obscene matter in the mail, and cannot be extended to include a guilty knowledge of the writings, papers, etc.

* * * * * *

"The court is of the opinion that the indictment does not set forth the offense with clearness and all necessary certainty, so as to apprise the accused of the crime with which she stands charged, and every ingredient of which the offense is composed is not accurately and clearly alleged. It is defective because it does not allege that the defendant knew that the writings, papers, etc., which she is charged with having deposited in the mail, for mailing and delivery, were of an obscene, lewd, and lascivious character. This conclusion is clearly sustained by principle and precedent; and the motion in arrest of judgment must be sustained."

See also *United States vs. Trumbull*, 46 Fed. Rep., 755.

And these principles apply as well to proceedings instituted upon information or complaint as to those brought upon indictment, and to courts of civil law or admiralty jurisdiction as to those of common law. In *The Hoppet vs. United States,* 7 Cranch, 389, this court, by Chief Justice Marshall, said (p. 393):

> "It is not contended that all those technical niceties which are unimportant in themselves, and standing only on precedents of which the reason cannot be discerned, should be transplanted from the courts of common law into the courts of admiralty. But a rule so essential to justice and fair proceeding as that which requires a substantial statement of the offense upon which the prosecution is founded must be the rule of every court where justice is the object, and cannot be satisfied by a general reference to the provisions of a statute. It would require a series of clear and unequivocal precedents to show that this rule is dispensed with in courts of admiralty, sitting for the trial of offenses against municipal law.
>
> "It is, upon these and other reasons, the opinion of the court, that the information is not made good by the allegation that the offenses was committed against the provisions of certain sections of the act of Congress.
>
> "Is it cured by any evidence showing that in point of fact the vessel and cargo are liable to forfeiture?
>
> "The rule that a man shall not be charged with one crime and convicted of another, may sometimes cover real guilt, but its observance is essential to the preservation of innocence. It is only a modification of this rule, that the accusation on which the prosecution is founded should state the crime which is to be proved, and state such a crime as will justify the judgment to be pronounced.
>
> "The reasons for this rule are:
>
> "1st. That the party accused may know against what charge to direct his defense.
>
> "2d. That the court may see, with judicial eyes, that the fact alleged to have been committed is an offense against the laws, and may also discern the

> punishment annexed by law to the specific offense. These reasons apply to prosecutions in courts of admiralty with as much force as to prosecutions in other courts. It is, therefore, a maxim of the civil law that a decree must be *secundum allegata* as well as *secundum probata*. It would seem to be a maxim essential to the due administration of justice in all courts."

The foregoing principles have been recognized by the Supreme Court of the Philippine Islands in the case of *United States vs. Salcedo*, 3 Off. Gaz., 195, in which Mr. Justice Johnson, speaking for the court, says (p. 196):

> "Offenses created by statute, as well as offenses at common law, must be accurately and clearly described in the complaint. No complaint, whether for a statutory crime or a crime at common law, will be held to be good if it does not accurately and clearly allege all of the ingredients of which the offense is composed. In other words, the complaint must state all the facts and circumstances which go to make up the offense as defined in the statute or by the common law so as to bring the defendant precisely within it. * * * A complaint will be sufficient if it describes the offense in the language of the statute whenever the statute contains all of the essential elements constituting the particular offense. Of course it need not be stated that the names of the parties and the time and *place* of the commission of the offense must also be alleged in connection with the description of the offense."

It may be contended that the defect in the complaint which has just been pointed out relates only to the plaintiff in error, Vicente Serra; that its sufficiency as against his co-defendant, Señora Obleno, is not thereby affected. We do not think such contention would be sound. Where two are jointly indicted for the offense of adultery and the prosecution fails as to one, the case should be dismissed as to the other. *State vs. Parham*, 5 Jones (N. C.), 416; *State vs. Mainor*, 6 Ired., 340.

This specially applies to the crime of adultery under the Philippine and Spanish laws. The intent of the statutes is plain that one of the codefendants shall not be subjected to prosecution or punishment except the other be likewise prosecuted and punished.

The second paragraph of article 434 of the Philippine Penal Code, *supra*, seems to have been incorrectly translated, thereby losing some of its force. It is given thus in the official translation:

> "ART. 434. No penalty shall be imposed for the crime of adultery except upon the complaint of the aggrieved husband.
>
> "*The latter can enter a complaint against both guilty parties, if alive,* and never, if he has consented to the adultery or pardoned either of the culprits."

The Spanish text is as follows:

> "ART. 434. *No se impondrá pena por delito de adulterio sino en virtud de querella del marido agraviado.*
>
> "*Este no podra deducirla sino contra culpables, si uno y otro vivieren, y nunca si hubiere consentido el adulterio ó perdonado á cualquiera de ellos.*"

Manifestly a more correct translation of the second paragraph of this article would be:

> "The latter cannot present it [the complaint] except against both guilty parties if both are alive, and never, if he shall have consented to the adultery or pardoned either of them [the culprits]."

Thus the injured husband cannot proceed except against both parties to the offense, if both are alive, and against neither if he shall have pardoned one.

Again, Article 435 of the Penal Code, *supra*, provides:

> "ART. 435. The husband may at any time obtain the remission of the punishment imposed upon his wife.
>
> "In such case the adulterer's penalty shall also be considered as remitted."

Clearly, then, the law does not contemplate the prosecution of one of the offending parties without the prosecution of the other, if he or she be alive, nor the punishment of one of them, if the other escape punishment.

This is the effect of the Spanish law and authorities. Escriche, commenting upon articles 448 and 449 of the Spanish Penal Code of 1870, corresponding to articles 434 and 435 of the Philippine Penal Code, says (Tom. I, fol. 324):

> *"Segun el pár. 2.° dicho art. 449, el marido no puede deducir la querella, sino contra ambos culpables, si uno y otro vivieren, y nunca si hubiera consentido el adulterio ó perdonado á algun de ellos. No es, pues, permitido al marido perseguir solamente al coautor del adulterio con su mujer; disposicion que se funda en evitar los abusos y venganzas contra determinadas personas, á pretexto de adulterio, y en que la persecucion contra el coautor recaeria ó se reflejaria en la mujer, produciendo las mismas consecuencias que la acusacion intentada directamente contra esta.*
>
> *"Mas no solamente limita la ley la facultad de acusar de este delito á solo el marido, sino que hasta le concede la de remitir en cualquier tiempo la pena á su consorte, segun el art. 450 del Código penal reformado, conforme en este con lo prescrito por la ley 4, tit. 26, lib. 12 de la Nov. Recopilacion, si bien en este caso se tendrá tambien por remitida la pena al adultero segun el pár. 2 del art. citado del Código penal.*
>
> * * *
>
> *"La disposicion del par. 1° del art. 450 se funda en que siendo el adulterio una falta de fidelidad al afecto conyugal, es natural que se permita al marido su perdon; y la del. pár. 2° de dicho articula en las mismas consideraciones que la disposicion del art. 449, ya expuesta."*

II.

Second and Third Specifications of Error.

The complaint herein fails to state any place where the alleged acts of adultery were committed, or to show that they were committed anywhere within the jurisdiction of the court, and is hence fatally defective. The court below in entering judgment of conviction thereon violated the fundamental constitutional guarantees of the Philippine Bill of Rights.

The complaint in this case contains no statement whatever as to the place where the alleged acts of adultery were committed. There is nothing even to show that such acts were committed anywhere within the jurisdiction of the court. For aught in the complaint, they might have been committed in Spain or in the United States, or anywhere else outside of the Province of Albay and the Philippine Islands, in which event the court below would have had no jurisdiction.

It is elementary that an indictment, information, or complaint, in order to sustain a valid conviction, must state with some degree of definiteness the place where the offense was committed, and must always show that it was committed at some place within the jurisdiction of the court. Of course, where no place whatsoever is alleged, the indictment or complaint shows on its face that it is fatally defective. This rule is recognized by the law governing criminal practice in the Philippines.

General Orders No. 58, 1900, section 6, *supra*, requires the complaint or information to show "that the offense was

committed within the jurisdiction of the court and is triable thereunder."

In *United States vs. Betiong*, 2 Phil., 126, the Supreme Court of the Philippines reversed the judgment of conviction, because "The place where the alleged crime was committed is not stated in the complaint."

The principle that an indictment, complaint, or information must allege some *locus* of the offenses is universal (Bishop's Crim. Pro.(4th ed.), vol. I, chap. XXIV; Wharton's Crim. Pl. & Pr. (9th ed.), secs. 139–150). The reasons for it are obvious: (1) That the accused may be informed of the charge in this respect—the nature and cause of the accusation—and be prepared to meet it; (2) that the trial court may see that it has jurisdiction of the offense; and (3) that the judgment rendered thereon may be so definite that the defendant may avail himself of it in plea of former acquittal or conviction. In a larger sense, it is essential because of the fundamental principle that the verdict and judgment must be responsive to the charge, because they are based on the charge and because neither verdict nor judgment can be larger than the charge.

As said in the case of *The Hoppet, supra*, under the civil law as well as under our system of jurisprudence, judgment or decree "must be *secundum allegata* as well as *secundum probata*—a maxim essential to the due administration of justice in all courts."

All authorities hold that the indictment or compiaint must show that the offense was committed within the court's jurisdiction. Thus in *United States vs. Wood*, 2 Wheeler Cr. Cas., 325; 28 Fed. Cas., No. 16,757, Mr. Justice Washington, sitting on circuit, held (p. 761):

> "It is indispensable that the indictment should distinctly show that the court has jurisdiction of the offense, and it ought, therefore, to have laid it to have been committed in the eastern district. And since it might be proper in some cases of a capital nature

> to try the cause in the county where the offense was committed, there would seem to be a propriety in stating the county also in the indictment, though on this point we give no positive opinion at this time, the case not requiring it. Upon the whole, we are of opinion that the judgment must be arrested for the reason which has been stated."

And in *United States vs. Anderson*, 17 Blatchf., 238; Fed. Case No. 14,448, a prosecution under section 5346, United States Revised Statutes, for an assault committed at a place within the jurisdiction of the United States "and out of the jurisdiction of any particular State," Judge Benedict quashed the indictment which alleged the assault to have been committed on board a vessel "in the harbor of Guantanamo, in the island of Cuba, on waters within the admiralty jurisdiction of the United States," because it failed to state that the place was out of the jurisdiction of any State of the United States, saying:

> "The act charged is an assault with a dangerous weapon on board the brig *Sarah and Emma*, a vessel belonging in whole or in part to a citizen of the United States, in the harbor of Guantanamo, in the island of Cuba, on waters within the admiralty jurisdiction of the United States. The objection taken to this indictment is, that it contains no averment that the place where the offense is said to have been committed is out of the jurisdiction of any of the States of the Union. In the case of *U. S. v. Jackelow*, 1 Black (66 U. S.), 484, it was held by the Supreme Court of the United States that the question whether a particular place be out of the jurisdiction of any State, when material in determining the extent of the jurisdiction of a court, is a question of fact, to be passed on by the jury; and, in that case, the Supreme Court set aside a special verdict which found the offense to have been committed in waters adjoining the State of Connecticut, between Norwalk Harbor and Westchester county, in the State of New York, at a point five miles eastward of Lyons' point (which is the boundary between the States of New

> York and Connecticut) and one mile and a half from the Connecticut shore at low-water mark, upon the ground that, in the absence of a finding by the jury that the place so described was out of the jurisdiction of any State, it was impossible for the court to determine such to be the fact. If it was not competent for the Supreme Court, from such a description of the place as was given in Jackelow's case, to say that the court had jurisdiction to try the offender, certainly it will not be competent for this court to say that it has jurisdiction to try the defendant for an offense committed 'in the harbor of Guantanamo, in the island of Cuba.' There may be an island called Cuba within the jurisdiction of some of the States of the Union, and, for all that is stated in this indictment, therefore, the place described may be within the jurisdiction of such State. If, as the Supreme Court held in the case referred to, the question whether a certain place is out of the jurisdiction of a State be a question of fact, to be determined by the Jury, then the fact must be averred and proved. No such averment is contained in this indictment, and, upon the authority of the Supreme Court of the United States, the omission must be held to be fatal."

And in *United States vs. Wilson,* Baldw., 78; 28 Fed. Cas., No. 16,730, pp. 699, 717, Mr. Justice Baldwin, on the circuit, held that while an indictment in a federal court need not aver the county in which the offense was committed, it must allege that the offense was committed within the federal district.

Again, in *United States vs. Burr,* Fed. Case No. 14693, Chief Justice Marshall said:

> "The place in which the crime was committed is essential to an indictment, were it only to show the jurisdiction of the court. It is also essential for the purpose of enabling the prisoner to make his defense."

See also *United States vs. Jackalow,* 1 Black, 484;

Ledbetter vs. United States, 170 U. S., 606, 613.

United States vs. Burns, 54 Fed. Rep., 351, 360.

In *Knight vs. State,* 54 Ohio St., 365, the Supreme Court of Ohio, by Mr. Justice Spear, said (p. 375):

> "It is elementary, we suppose, that an indictment in order to be sufficient, must aver, with reasonable certainty, all the material facts necessary to a conviction. Nothing is to be left to intendment or inference which is necessary to prove in order to make out the crime. *State v. Philbrick,* 31 Maine, 401; *U. S. v. Hess,* 124 U. S., 483; Am. & Eng. Enc. of Law, vol. 19, p. 566, and authorities cited.
>
> "Venue is one of the essentials of an indictment for a number of reasons. One is that it must appear that the court to which the indictment is presented has jurisdiction of the offense. Another that the defendant may be informed of the charge in this respect so that he may be prepared to meet it. A third is that the judgment may be pleaded in bar to any second indictment for the same offense. The *State v. Cotton,* 4 Foster, 143; Bishop's Crim. Prac., p. 225. And that the prosecution must be had in the county where the unlawful act was committed was held by this court in the recent case of *The State v. Knight et al.,* 35 W. L. B., 175.
>
> "It is insisted by counsel for the State that venue sufficiently appears, and that whether it does otherwise or not, it must be inferred that the criminal acts were committed in the county of Wood because it is charged that the defendants made the contract as county commissioners, and the only possible place where such a contract could be made was within the county of Wood. If it were conceded that the commissioners could not legally make such a contract outside the limits of Wood county, yet it would not follow as a legal conclusion that the transaction did not occur outside the county, for manifestly the acts were such as it was possible to commit without the county, especially does it not follow in view of the character of the prosecution. As pithily observed by counsel for plaintiff in error: They cannot be presumed to have followed the law, as they are expressly accused of violating it. To infer that they acted lawfully in this respect in order to support a charge that

they acted unlawfully in another respect would be a strange application of legal presumptions.'

"But, be this as it may, the claim cannot be maintained, for, as already stated, the indictment must be explicit, and leave nothing to mere inference. Am. & Eng. Ency. of Law, vol. 10, p. 567; *Phipps et al. vs. The State,* 22 Md., 380; *The State vs. Leay,* 3 Stewart (Ala.), 123; *Smith vs. The State,* 21 Neb., 552; *U. S. vs. Morrisey,* 32 Fed. Rep., 147.

"It is further argued that, even though the indictment might not be good at common law, yet it is saved by section 7215, Revised Statutes, called the statutes of jeofails. The clauses of that section which bear relation to this question are these: 'No indictment shall be deemed invalid * * * for want of an allegation of the time or place of any material fact, when the time and place have been once stated in the indictment; * * * nor for want of averment of any matter not necessary to be proved; nor for any other defect which does not tend to the prejudice of the substantial rights of the defendant upon the merits.'

"The proposition is not tenable. If allegation of place of the offense had 'once been stated in the indictment,' then by proper incorporation of 'then and there' at other places where allegation of place is wanting, the requirement of certainty might have been assumed, but we have found that the instrument is barren of any allegation of place. Now, can it be said that the place of the offense, *i. e.,* the county, was not necessary to be proven, for how could a conviction be sustained without it? *Neither can it be said that the question of place did not affect the substantial rights of the defendants, for how, if not alleged, could they intelligently prepare their defense, or how could the record serve the defendants as a bar to a second prosecution for the same offense?* In general terms it may be said as to this defect that the indictment fails to aver all the material facts necessary to a conviction. *Lamberton v. The State,* 11 Ohio, 282. And such failure is fatal, as well since the statute as at common law. *Ellars v. The State,* 25 Ohio St., 385.

"The demurrer to the indictment should have been sustained. It was error to overrule it."

5

In *Thayer vs. Commonwealth*, 12 Met., 9, the Supreme Court of Massachusetts, by Chief Justice Shaw, said:

> "There is no doubt that the complaint is erroneous in not stating within what town or county the alleged assault was committed; so that it does not appear that the justice of the peace had jurisdiction."

And, again, in *Commonwealth vs. Barnard*, 6 Gray, 488, the same court said:

> "It does not appear in this complaint that West Brookfield, the place where the defendant is charged with having sold intoxicating liquor, is either a town, or a place within the county of Worcester. It therefore does not appear that any magistrate in this county, or any court held in this county, has jurisdiction of the offense set forth in the complaint. * * * Judgment arrested."

In *State vs. Bacon*, 7 Vt., 219, the Supreme Court of Vermont said (p. 222):

> "Every indictment must contain direct allegations, with *time and place*, of every fact necessary to constitute the offense. * * *
>
> "Now this indictment is entirely destitute of any allegation when or *where* the stove or saddle were procured, or whether it was ever in the county of Bennington. It shows no offense in the State or county where the indictment was found. Judgment arrested."

In *People vs. Higgins*, 15 Ill., 110, the Supreme Court of Illinois said:

> "The first count was bad for the want of a proper venue. It does not state in what county the offense was committed. It is as essential to an information that a proper venue be laid, as to a declaration or an indictment."

So in *State vs. Searcy,* 4 Tex., 450, the Supreme Court of Texas held (p. 451):

> "There is no *venue* laid in the indictment, to the facts charged as constituting the offense. And this is *a fatal defect,* for which the indictment ought to have been quashed, or the judgment arrested, on the motion of the defendant."

And again, in *State vs. Johnson,* 32 Tex., 96, the same court said:

> "The motion to quash the indictment in this case was properly sustained. There is no allegation in it of either the *time* or the *place* of the commission of the offense. The first is necessary, that it may appear from the charge it is not barred by the statute of limitations. The other is indispensable, that the court may know whether it has jurisdiction of the cause."

In *Connor vs. State,* 29 Fla., 455, the Supreme Court of Florida, held (p. 481):

> "It is a settled rule that if the indictment or information is uncertain, or repugnant to itself, as to the county, or other jurisdictional locality, of the commission of the offense, or, in other words, as to the venue of the offense, it will be held insufficient."

In *State vs. Beebe,* 83 Ind., 171, the Supreme Court of Indiana said (p. 172):

> "The defendant moved the court to quash the affidavit and information, upon the ground that no venue was named in the affidavit. The motion to quash was sustained and the defendant discharged.
>
> "Error is assigned upon the decision of the court quashing the affidavit and information.
>
> "An indictment must, in some manner, name with certainty the county and State in which the offense charged was committed.
>
> "This may be done in the body of the indictment, or may be first stated in the caption, and afterwards

referred to in some appropriate way in connection with the venue of the offense. In charging offenses, the same certainty is required in the affidavit and information that is necessary in an indictment. Moore's Criminal Law, section 134; *Walker v. State,* 23 Ind., 61; R. S. 1881, section 1731.

"As an information must be based upon an affidavit, it will be quashed when the affidavit is insufficient. Moore's Criminal Law, section 135; *State v. Cuppy,* 50 Ind., 291; *Davis v. State,* 69 Ind., 130.

"As has been seen, the affidavit filed in this cause did not either name, or in any other manner distinctly indicate, the State in which the alleged offense was committed. It was for that reason insufficient to support the information based upon it. There was, consequently, no error in quashing both it and the information."

And in *State vs. Bushey,* 84 Me., 459, the Supreme Court of Maine said (p. 460):

"The case finds that the respondent was tried upon the second count in an indictment, in which count it is alleged that he unlawfully transported liquors on a certain day 'from Burnham in the county of Waldo to Clinton in the county of Kennebec.'

* * * "A motion in arrest was filed and overruled, and exceptions taken. The question on such motion is whether any part of the offense is alleged to have been committed in the county of Kennebec. Upon the rules of criminal pleading, we think not. The termini named are border towns in different counties. The transportation was 'to' the town of Clinton, not into or within it. Going to a line is not going beyond it—is not crossing the line. The description is of the territory of towns and not of villages or settlements. Kennebec county is excluded from the transportation. Very likely there is a route for travel from one of the towns named to the other without crossing into Kennebec county.

"To, from, or by, are terms of exclusion, unless by necessary implication they are manifestly used in a different sense. Such is the rule of construction even

> in civil cases. * * * But, in all matters of criminal pleading, the want of a direct and positive allegation in the description of the substance, nature or manner of the offense, cannot be implied by any intendment, argument or implication whatever. The charge must be laid positively and not inferentially. * * * *Exceptions sustained.*"
>
> See also *State vs. Landry,* 85 Me., 95, 96.

Again, in *Commonwealth vs. Phelps,* 170 Pa. St., 430, the Supreme Court of Pennsylvania said (p. 432):

> "In this case the complaint on which the conviction is based is fatally defective; the foundation will not support the superstructure. The defect consists of the omission from the complaint of a jurisdictional fact. The written complaint in this case fails to show that the acts mentioned in it were committed in Lackawanna county."

In *State vs. Chamberlain,* 6 Nev., 257, the trial court allowed the indictment to be amended by alleging the venue of the crime, but the Supreme Court of Nevada on writ of error reversed the judgment, saying (p. 259):

> "The defendant was indicted by the grand jury of the county of Elko, for the crime of murder. The indictment found and presented by them containing no allegation to the venue or locality of the crime, a motion was made before the district court for leave to amend it in that particular, which being allowed, the addition was made and the defendant arraigned and put upon his trial, convicted of murder in the second degree and sentenced in accordance with law. Upon the appeal it is claimed the court below erred in allowing the amendment, and in trying the defendant upon the indictment so amended.
>
> "This point we think well taken. An allegation of the county wherein a crime is committed is manifestly material, as much so as any fact constituting the body of the offense itself. It has always been held necessary by the courts, and indictments have

> invariably been held insufficient which did not in some way state the locality of the crime. * * *
>
> "True, the statute (Stats. 1867, 126) prescribes a form from which the venue seems to be omitted, but it will be observed the section following that prescribing the form requires the statement of all essential facts. This last section we think should control the mere form set out in the prior section * * *.
>
> *"The courts have no more authority to add any material charge, accusation or allegation to it than they have to find the bill in the first instance.* * * *
>
> "The judgment must be reversed and as the original indictment is radically defective, the court below will submit this case to another grand jury."

So important do the courts regard the averment of the locality of the offense, that if there is any ambiguity in its wording, the indictment is held defective in substance, and judgment thereon reversed. Thus in *Bell vs. Commonwealth,* 8 Gratt., 600, the General Court of Virginia held (p. 604):

> "There is a defect in the indictment, in not setting forth with sufficient certainty the county in which the larceny was committed, for which the judgment must be reversed. * * * Two counties had been previously mentioned before the county in which the larceny was committed is stated by the words 'in the county of aforesaid,' without stating to which of the previously named counties the word 'aforesaid' had reference. This manner of stating the county where the theft was committed is insufficient. 1 Chitt., Cr. Law, 160; Archbold's Pleading and Evidence in Criminal Cases, 49; 2 Gabbett's Cr. Law, 205; 1 Wms. Saund., 308, n. 1. * * * All the authorities agree that the indictment is bad, and for this error the judgment must be reversed."

And in *Kennedy vs. Commonwealth,* 3 Bibb., 490, the Court of Appeals of Kentucky said:

"On the part of the Commonwealth it is contended that the word 'there," as used in the latter part of this charge [indictment], refers to the county mentioned in the margin of the indictment; and thus by relation fixes the place where the offense was committed with sufficient certainty and precision. * * * The authorities referred to on the part of the Commonwealth * * * do not support the position that the word *there* will refer to the county named in the margin, where it has not been repeated in the body of the indictment. Indeed, an inference diametrically opposite to this position is clearly deducible from some of these authorities; for it is said to be holden that the want of an express allegation of the place where the offense happened is not supplied by putting it in the margin of the indictment, unless it go farther, as by adding *in comitatu predicto* or the like. 3 Bac. Abr., 550; 2 How. P. C., ch. 25, sec. 34.

"In this case the obvious relation of the word *there* in the charge of committing the battery, is to the place where the assault was made; and as there is evidently no place alleged where the assault was made, either expressly or by any words of implication or reference, it results that there is no place named to which the word *there* can relate.

"That the want of a venue is a substantial defect in the indictment, cannot be doubted. It is held to be so in England, because the grand jury are sworn to inquire for the body of the county, and therefore cannot regularly by the common law present any offense which does not arise within the county for which they are returned.

"The same reason holds here, *and is fortified by the consideration that the courts themselves have no jurisdiction over offenses committed out of their respective circuits.* Judgment reversed."

Again, in *Jane vs. State*, 3 Mo., 45, the Supreme Court of Missouri said (p. 46):

"It is clear law, and has been so adjudged by this court (2 vol. Mo. Rep., p. 228, *State v. Hardwick*),

> that if the facts be stated as to time or place, with repugnancy or uncertainty, the indictment will be bad; and if two times or places have been previously mentioned, and afterwards a part is only laid, 'then and there,' the indictment is defective, because it is uncertain to which it refers; and it is no answer to the objection to say, that 'then and there' will refer grammatically to the last antecedent time and place. It must be certain to every intent. This is peculiarly the doctrine in capital cases, and felonies of a high grade."

And in *State vs. McCracken*, 20 Mo., 411, the same court held (p. 412):

> "The court did not err in quashing this indictment. * * * Here, the county of Hickory is named, and also the county of Polk—two counties mentioned in the body of the indictment, and the offense is stated to have been committed 'at the county aforesaid,' without showing certainly which county; this, according to the case of *The State v. Hardwick*, is not sufficient. The same rule in regard to indictments is again laid down by this court in the case of *Jane v. The State* (3 Mo. Rep., 63). When two different times and two different places are mentioned in an indictment, and a material fact is afterwards averred, it will not be sufficient to give venue to such fact, by stating 'then and there,' only; for it will not do to say that, grammatically, 'then and there' refer to the last cedent time and place. Upon looking into this indictment we are satisfied the circuit court committed no error in quashing the same."

In *State vs. Brown*, 12 Minn., 490, the Supreme Court of Minnesota said (p. 492):

> "The defendant, tried and found guilty, moved in arrest of judgment, because, 1, the indictment does not charge an offense * * * We think the indictment bad—while our statute dispenses with mere formality, or technicality, it requires certainty in every material allegation or charge. * * *

"It does not positively allege where the offense was committed. The word 'there' is in indictments used to refer to a place before particularly designated; but in this case, the venue or place of the commission of the offense, is not positively alleged, or certainly indicated. Without reference to any place or county, except as a description of the court or of the grand jury, or as a description of the office held by the defendant, it is alleged, that he *'then and there,'* did extorsively demand, etc. *There,* in the connection here used, is not equivalent to the expression 'in the county aforesaid,' and does not certainly show the county in which the crime was committed. See *Kennedy v. Commonwealth,* 3 *Bibb.,* 490."

In *Cain vs. State,* 18 Tex., 392—

'the indictment after 'State of Texas, county of Fayette,' and the usual commencement, charged 'that James Cain, late of Travis county aforesaid, yeoman, with force and arms in the county aforesaid, on, etc., did then and there feloniously steal, take, and carry away,' etc. Motion in arrest of judgment on the ground that the indictment did not charge that the offense was committed in the county of Fayette."

The court held:

"The rule of law applicable to indictments, is, that if the fact be stated as to time and place with repugnancy or uncertainty the indictment will be bad. Whart., Am. Cr. L., 113, 143. In this indictment there is manifest repugnancy in the statement as to the place or county where the offense was committed. There was good ground in arrest of judgment. There was error, therefore, in refusing to sustain the motion on the ground of repugnancy and uncertainty in stating the venue.'

And in *Commonwealth vs. Wheeler,* 162 Mass, 429, the court said:

"The defendant in the case at bar could not legally be convicted in the county of Worcester of the of-

> fense of which he was charged unless the indictment set forth that it was committed in that county. The indictment begins with the words 'Commonwealth of Massachusetts, Worcester, *ss:*' The defendant is described as of Buckland, in the county of Franklin, and the offense is alleged to have been committed 'at Westminster, in said county.' According to the authorities, such an indictment is bad, either because, two counties having before been named, it is uncertain to which the words 'in said county' refer, or because these words refer to the last antecedent, namely, the county of Franklin. 2 Hale, P. C., 180; 2 Hawk, P. C., c. 25, sec. 34; 2 Gabb. Crim. Law, 210; 1 Chit., Crim. Law (2d ed.), 194; *Elnor's case,* 1 Cro. Eliz., 184; 1 Wms. Saund.,308, n.; *Regina v. Rhodes,* 2 Ld. Raym, 886; *The King v. Moor Critchell,* 2 East, 66; *State v. McCracken,* 20 Mo., 411; *Cain v. State,* 18 Tex., 391; *Bell v. Commonwealth,* 8 Grat., 600.
>
> * * * * * * *
>
> "In the case at bar we are of opinion that the indictment does not allege with sufficient certainty that the offense charged was committed at a place within the county of Worcester, and that the motion to quash should have been granted. *Exceptions sustained.*"

Thus in the case at bar, the complaint containing no allegation as to where the alleged acts of adultery were committed and no averment that such acts were done within the jurisdiction of the court, must be held fatally defective and incapable of supporting the judgment rendered.

III.

Fifth Specification of Error.

The substantial defects in the complaint were not waived by defendants' plea, nor aided by judgment. Objection may be raised at any stage of the proceedings and by appeal or writ of error.

The Supreme Court of the Philippines declined to consider the objections raised to the sufficiency of the complaint herein, saying (Rec., 27):

> "Objections to the complaint based upon an insufficient statement of the facts constituting the offense cannot be considered here, because they were not presented in the court below" (citing *U. S. vs. Sarabia*).

In *United States vs. Sarabia*, 3 Off. Gaz., 403, the case cited in support of their decision here, the Supreme Court of the Philippines said (p. 404):

> "We hold that no objection to a complaint based upon a defective statement either in matter of form *or substance* of 'the acts or omission complained of,' as required by article 6, paragraph 3, of General Orders No. 58, not made in the court below, can be used in this court to obtain a reversal.
>
> "It may be said that this would require us to sustain a conviction where there was no complaint at all in the lower court. It is not possible that such a case could arise. The judges of the courts of first instance are required by act No. 136 to be men learned in the law. It is impossible to conceive of such a judge rendering a judgment of conviction where there was no complaint at all upon which to base it. And, further, it is impossible to conceive of such a judge rendering a judgment of conviction upon a complaint which he himself did not understand."

Now this doctrine, that substantial defects in the information or complaint are cured by judgment and cannot be considered on appeal, is not only against authority, but is directly contrary to the Philippine criminal law. Sections 9 and 10 of General Orders No. 58, 1900, *supra*, constitute the statute of jeofails and amendment of the Philippine criminal law. Section 9 provides:

> "SEC. 9. The information or complaint may be amended in substance or form, without leave of court, at any time before the defendant pleads; and thereafter, *during the trial, as to all matters of form*, at the discretion of the court, when the same can be done without prejudice to the rights of the defendant."

Section 10 is as follows:

> "SEC. 10. No information or complaint is insufficient, nor can the trial, judgment, or other proceedings be affected, by reason of *a defect in matter of form* which does not tend to prejudice a substantial right of the defendant upon the merits."

By the ordinary principles of interpretation the meaning of these statutes is plain, that *no* amendment to information or complaint *in matter of substance* can be made after the defendant pleads; and that an information or complaint defective in *substance* is insufficient, and judgment thereby affected.

But, whatever the local law may be, this case rests upon higher ground. Conviction on a complaint so defective as this violates the fundamental constitutional guaranties which this court has held in *Kepner vs. United States*, 195 U. S., 100, apply to the Philippine Islands, and which were expressly enacted as a Bill of Rights in the Philippine Civil Government act of July 1, 1902 (32 Stat., 691, 692). By them no person can be deprived of life, liberty, or property, or held to answer for a criminal offense, without due

process of law; and every person is entitled to be informed of the nature and cause of the accusation against him. Both of these guaranties are violated by the judgment in this case.

As said by Mr. Bishop in his work on Criminal Procedure (4th ed., vol. I, sec. 98*a*):

> "Under every sort of constitution known among us, an indictment which does not substantially set down, at least in general terms, all the elements of the offense—every act or omission which the law has made essential to the punishment it imposes—is void. And, besides this, under most of our constitutions the allegation must descend far enough into the particulars, and be sufficiently certain in its frame of words, to give the defendant reasonable notice of what will be produced against him."

And again the author says (*ibid.*, secs. 77-88):

> "Every wrongful fact, with each particular modification thereof, which, in law, is required to be taken into the account in determining the punishment upon a finding of guilty, must be alleged in the indictment. This doctrine is fundamental. Originating in natural reason and abstract justice, it has been adopted into the common law and confirmed by our written constitution.
>
> "It is a truth palpable, requiring no argument, that there cannot be a punishment without an accusation. If, with no charge against one, he is imprisoned or hung, we speak of the infliction as an outrage, and no one deems it correct in language to say that he is *punished*.
>
> "If a man is charged with acts legally punishable by imprisonment, then is hung for them, he is not punished, he is murdered. It is no more just to take his life on an accusation of something to which the law attaches a less penalty, than to do it with no accusation. And it makes no difference that in fact he is guilty of more than is charged, or more than is proved. Though what is set down against him is a part of a larger crime, still, if the indictment is silent as to the remaining part, he can no more be

punished for the whole than if no part of it had been alleged. To punish him for all, where he is not charged with all, is to punish him without accusation. Hence the rule which our jurisprudence has adopted from natural reason and justice, that the indictment must allege every fact and modification of fact legally essential to the punishment to be inflicted.

"This doctrine pervades the entire adjudged law of criminal procedure. It is made apparent, not alone by a simple case, but by all cases. The illustrations of it are without end."

* * * "The result is that in every case, with no exception, the common law requires each individual thing which itself or a statute has made an element in that wrongful aggregation out of which the punishment proceeds, to be alleged in the indictment. The court, in adjudging the punishment, can take into its consideration nothing except what is specifically charged."

"The right of a person pursued for crime, to have each several thing on which his punishment is to be founded set down against him in allegation, is with us secured by constitutional guaranties."

"By the United States Constitution, 'in all criminal prosecutions, the accused shall enjoy the right * * * to be informed of the nature and cause of the accusation.' But the 'nature and cause' of an accusation are not stated where there is an omission of anything necessary in law to justify the punishment."

As said in *United States vs. Cruikshank,* 92 U. S., 542, 557:

"In criminal cases, prosecuted under the laws of the United States, the accused has the constitutional right 'to be informed of the nature and cause of the accusation.' Amend. VI. In *United States v. Mills,* 7 Pet., 142, this was construed to mean that the indictment must set forth the offense 'with clearness and all necessary certainty, to apprise the accused of the crime with which he stands charged;' and in *United States v. Cook,* 17 Wall., 174, that 'every ingredient of which the offense is composed must be accurately and clearly alleged.'"

And again, as said by Chief Justice Marshall in *The Hoppet vs. United States,* 7 Cr., 389, 394:

> "The rule that a man shall not be charged with one crime and convicted of another, may sometimes cover real guilt, but its observance is essential to the preservation of innocence. It is only a modification of this rule, that the accusation on which the prosecution is founded, should state the crime which is to be proved, and state such a crime as will justify the judgment to be pronounced."

Defects in substance, such as exist in this complaint, are not cured by statute of jeofails. Section 1025, United States Revised Statutes, is substantially the same as the Philippine statute of jeofails, *supra.* Thus in *United States vs. Carll,* 105 U. S., 611, the court in holding the indictment insufficient for want of an allegation that the defendant knew the instruments to be forged, said (p. 613):

> "The omission is matter of substance, and not a 'defect or imperfection in matter of form only,' within the meaning of sec. 1025 of the Revised Statutes."

And in *Markham vs. United States,* 160 U. S., 319, Mr. Justice Harlan, delivering the opinion of the court, said (p. 326):

> "It is proper to add that sec. 1025 of the Revised Statutes providing that 'no indictment found and presented by a grand jury in any district or circuit or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant,' is not to be interpreted as dispensing with the requirement in sec. 5396 that an indictment for perjury must set forth the substance of the effense charged. An indictment for perjury that does not set forth the substance of the offense will not authorize judgment

upon a verdict of guilty. *Dunbar v. United States*, 156 U. S., 185, 192."

And in United States *vs.* Morrisey, 32 Fed. Rep., 147, Judge Thayer said (p. 153):

"In answer to the suggestion made on the argument of the motion that the defect in the indictment is cured by the statute of jeofails, section 1025, Rev. St. U. S., it is sufficient to say that the statute in question will not remedy a defect in an indictment of such a radical nature as a failure to charge an offense."

See Also:

United States vs. Conant, 25 Fed. Cas., No. 14844, pp. 591, 593.

United States vs. Noelke, 1 Fed. Rep., 426, 433.

United States vs. Davis, 6 Fed. Rep., 682, 684.

"Under our Constitution there is a limit to the power of these statutes in criminal cases; as, while they may cure formal defects in an indictment, they cannot validate one which in its allegation of facts omits any essential element of the crime."

Bishop's Crim. Pro., sec. 706*a*.

The defects in this complaint are not such as can be waived by pleading to it. That indictment or complaint set forth all the facts and contain all the elements necessary to constitute the offense, is requisite to due process of law. It is not a requirement that can be waived by the accused. As said by Judge Parker in *Ex parte McClusky*, 40 Fed. Rep., 71, 74, when the accused pleaded guilty and were afterwards discharged on writ of *habeas corpus:*

"Due process of law, in a case like the one charged against petitioners, means compliance by the Government with a fundamental requisite, such as that the party shall be charged with the crime in the way provided by the Constitution and laws of the United States. Liberty, under such Constitution and laws,

> is an inalienable prerogative, of which no man by mere agreement can divest himself. Any divestiture not occurring by due process of law is null. Whart. Crim. Law, (9th ed.) § 145. Mr. Cooley in Constitutional Limitations, (page 182) says: 'A party may consent to waive rights of property, but the trial and punishment for public offenses are not within the province of individual consent or agreement.' This means that, by individual consent or agreement, fundamental rights cannot be waived. The substantial constitution of the legal tribunal and the fundamental mode of its proceeding are not within the power of the parties."

Nor are defects of this nature cured by verdict or by judgment.

The Hoppet vs. United States, 7 Cr., 389, 394.

As said in *United States vs. Hess,* 124 U. S., 483, 488:

> "The essential requirements, indeed, all the particulars constituting the offense of devising a scheme to defraud are wanting. *Such particulars are matters of substance and not of form, and their omission is not aided or cured by the verdict.*"

And objections based on such defects may first be raised on appeal or writ of error.

Cochran and Sayre vs. United States, 157 U. S., 286.
United States vs. Cook, 17 Wall., 168, 174.
United States vs. Dunbar, 156 U. S., 185, 192.

Especially is this true in the Supreme Court of the Philippine Islands, where on appeal the case is opened up *de novo* with full power to enlarge the judgment and increase the punishment, as was done in the case at bar.

Kepner vs. United States, 195 U. S., 100.
Trono vs. United States, 199 U. S., 521, 534.

As the Supreme Court of the Philippines went so far in this case as to impose an additional sentence, it was surely

their duty to examine the complaint as to its sufficiency to sustain their judgment.

The extent to which the Philippine Supreme Court have carried their ruling that they would not consider objections raised to the sufficiency of the complaint in matters of substance is shown in the case of *United States vs. Bibal*, 3 Off. Gaz., 371, where the complaint on which the defendant was tried and convicted was not sworn to. The court, however, held that this was a mere defect of form, and at any rate they would not set aside the judgment on that account, saying:

> "It is suggested that the complaint presented by a private person not having been sworn to is void. The provincial fiscal, on February 3, 1903, certified in writing that he found the complaint sufficient, and named three other witnesses for the prosecution. Whether this amounted to an adoption by him of the complaint, and made it an information which did not require an oath, it is not necessary to decide. *The want of an oath was, in any event, a defect of form which did not affect the substantial rights of the defendant on the merits. Article 10 of General Orders, No. 58, does not permit a judgment to be set aside for such a defect.*"

Even more remarkable is the case of *United States vs. Cajayon*, 2 Off. Gaz., 157, in which the majority of the court held that an information which did not allege any killing was sufficient to support a conviction of murder. In this case nine persons were tried and convicted of murder upon the following complaint (p. 160):

> "The undersigned charges Emiliano Cajayon, Candico Aguilar, Felix Aguilar, Mariano Aguilar, Domingo Castillo, Pioquinto Cajayon, Quintin de Leinos, Tomas Ramiriz and Gregorio Tria, of the town of Salinas, and Pantenople of the province of Batangas, of the crime of murder, committed as follows:
>
> "That the said Emiliano Cajayon and his compan-

> ions above named, armed with guns, on the night of the 21st of March 1901, in the town of Lubang, of this province, entered the house of Dona Ana Muriel, seized Tranquilino Torres, and, after having tied his hands, carried him toward the beach; four days later the remains of the body of Tranquilino Torres were found on the said beach; this against the statute in the case made and provided."

When the case came before the Supreme Court of the Philippines, the Solicitor General filed a petition asking because of the insufficiency of the complaint, that the judgment be set aside and that the court direct the filing of a new information for the crime of murder. This petition the court denied in the following language (p. 159):

> "In the information upon which the prosecution is based some deficiency is to be observed in the statement of the facts constituting the crime of murder with which the defendants are charged, and on this account the Solicitor General asks that the proceedings be set aside, that the judgment be reversed, and that the court direct the filing of a new information for the crime of murder, the commission of which is disclosed by the evidence.
>
> "No objection was made to the information by the defendants or their attorney, either in the court below or in this court. They failed to register any exception or protest on the ground of the nullity of the information or of the trial, nor has any application been made for a new trial because of such deficiency. For this reason, in view of the result of the proceedings, and in view of the fact that the offense charged has been properly defined and designated in the information in question, the petition of the Solicitor General must be denied."

Mr. Justice Cooper, however, dissented, saying (p. 160):

> "The solicitor general in his brief requests the annulment of the judgment of the Court of First Instance and asks that the case be remanded to the lower court, with instructions that the court direct the

presentation of a new complaint for the crime of *asesinato* or murder. He is of opinion that the complaint upon which the defendants have been convicted is insufficient to sustain a conviction of this offense. In this view I concur."

He then quotes the complaint, *supra,* and then adds:

"The complaint does not comply with the requirements of section 6 of the General Orders No. 58. In defining the requisites of a complaint or information, it is provided in paragraph 3, that 'the complaint should show the acts or omissions complained of as constituting the crime or public offense in ordinary and concise language.'

"*It does not appear from the complaint that the defendants did anything more than to seize and carry off the deceased, and that his body was afterwards found. This would not constitute the offense of murder.*

"*While there may be a strong inference from the circumstances set forth in the indictment that the defendants did actually kill the deceased, yet the complaint wholly fails to state this most important element.*

"It is to be further observed that the complaint does not state that the offense was committed with *alevosia* or with premeditation. These are qualifying circumstances of the offense of murder and have the effect of raising ordinary homicide to that of murder. Had it been directly alleged in the complaint that the defendants killed the deceased, this would not constitute murder in the absence of the qualifying circumstance either of *alevosia* or premeditation.

"Article 404, Penal Code, provides that he who shall kill another without the attendance of these circumstances is guilty of homicide and is punishable with the penalty of *reclusión temporal,* under which the highest penalty that can be assessed is twenty years of *reclusión temporal.*

"The court in its decision not only held the complaint sufficient to show a killing by inference, but

entirely ignores the omission to state that the killing was with premeditation or *alevosia*. The defendants have been found guilty not only of the killing of the deceased, but of its having been done with *alevosia*, and the penalty of life imprisonment has been assessed—the penalty fixed by article 403 for the crime of murder.

"It is immaterial in my opinion whether there was an objection or demurrer made to the complaint in the lower court, or whether objections have been made in this court The complaint is fatally defective."

There is no evidence in the case to show that the plaintiff in error, Serra, knew that Señora Obleno was married. It appears that when a young girl she went through a marriage ceremony with Murtiga, being forced thereto by her father's threats and beating (Rec., 16, 17). She made no response at the time the marriage ceremony was performed (Rec., 15). There is direct testimony to show that they never lived together in the marriage relation (Rec., 15, 16, 21, 22). She always lived at her mother's house (Rec., 11, 15), and has received no support from her husband (Rec., 21). Serra was not living there when the marriage ceremony was performed (Rec., 10, 17), and did not come to the town until 1899, some three years later (Rec., 10, 11, 17). Murtiga admits that, although living for four or five years in the same town, he has never spoken to Serra about his living with his wife and never did anything to oppose it. These circumstances probably account for the failure of the complaint to allege that Serra knew of the marriage. Murtiga lived for years in the same town, knowing the relations these plaintiffs in error sustained to each other, all without protest, permitting them to continue living together until two children were born to them, when suddenly he filed the complaint. Under these circumstances the sentence imposed by the court below seems unusually severe, and is distressingly so when we consider its grievous hardship to

the little child, three years old, whom it deprives of both its parents.

For the reason stated, we submit that the judgment herein of the Supreme Court of the Philippine Islands should be reversed, with directions to dismiss the complaint.

Respectfully submitted,

ALDIS B. BROWNE,
ALEXANDER BRITTON,
MAURICE KELLY,
Counsel for Plaintiffs in Error.

Supreme Court of the United States.

No. 202.—October Term, 1906.

Vicente Serra and Maria Obleno, Plaintiffs in Error, *vs.* Adriano Mortiga. } In error to the Supreme Court of the Philippine Islands.

[February 25, 1907.]

Mr. Justice White delivered the opinion of the Court.

Articles 433 and 434, found in chapter 1 of title IX of the Penal Code of the Philippine Islands, define and punish the crime of adultery. The articles referred to are in the margin.*

It is conceded at bar that, under the Philippine law, the offense of adultery, as defined by the articles in question, is classed as a private offense, and must be prosecuted, not on information by the public prosecutor, but by complaint on behalf of an injured party. In the Court of First Instance of Albay, Eighth Judicial District, Philippine Islands, Adriano Mortiga, the defendant in error, as the husband of Maria Obleno, filed a complaint charging her with adultery committed with Vicente Serra, the other plaintiff in error, who was also charged. The complaint is in the margin.†

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*Art. 433. Adultery shall be punished with the penalty of prisión correccional in its medium and maximum degrees.

Adultery is committed by a married woman who lies with a man not her husband, and by him who lies with her *knowing that she is married*, although the marriage be afterwards declared void.

Art. 434. No penalty shall be imposed for the crime of adultery except upon the complaint of the aggrieved husband.

The latter can enter a complaint against both guilty parties, if alive, and never, if he has consented to the adultery or pardoned either of the culprits.

†The United States of America,
Philippine Islands, Eighth Judicial District:

In the Court of First Instance of Albay.

The United States and Macario Mercades, in Behalf of Adriano Mortiga,
v.
Vicente Serra and Maria Obleno.

The undersigned, a practicing attorney, in behalf of Adriano Mortiga, the husband of Maria Obleno, accuses Vincente Serra and the said Maria Obleno of the crime of adultery, committed as follows:

The defendants were arraigned, pleaded not guilty, were tried by the court without a jury and were convicted. The court stated its reasons in a written opinion, analyzing the testimony and pointing out that all the essential ingredients of the crime of adultery, as defined by the articles of the penal code already referred to, were shown to have been committed. The accused were sentenced to pay one-half of the costs and to imprisonment for two years, four months and one day. The record does not disclose that any objection was taken to the sufficiency of the complaint before the trial. Indeed, it does not appear that by objection in any form, directly or indirectly, was any question raised in the trial court concerning the sufficiency of the complaint. An appeal was taken to the Supreme Court of the Philippine Islands. In that court error was assigned on the ground, first, that "the complaint is null and void because it lacks the essential requisite provided by law;" and second and third, because it did not appear from the proof that guilt had been established beyond a reasonable doubt. The conviction was affirmed. The assignment of error, which was based on the contention that the conviction was erroneous because the complaint did not sufficiently state the essential ingredients of the offense charged, was thus disposed of by the court in its opinion: "The objection to the complaint, based upon an insufficient statement of the facts constituting the offense, cannot be considered here, because they were not presented in the court below. (*United States* v. *Sarabia*, 3 Off. Gaz. No. 29.)"

The assignments, based on the insufficiency of the proof to show guilt beyond a reasonable doubt, were disposed of by an analysis of the evidence which the court deemed led to the conclusion that all the statutory elements of the crime were proven beyond a reasonable doubt. An applica-

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That on or about the year 1899, and up to the present time, the accused, being both married, maliciously, criminally and illegally lived as husband and wife, and continued living together up to the present time, openly and notoriously, from which illegal cohabitation two children are the issue, named Elias and José Isabelo, without the consent of the prosecuting witness, and contrary to the statute in such cases made and provided.

(Signed) MACARIO MERCADES,
Attorney at Law.
(Signed) ADRIANO MORTIGA.

ALBAY, February 24, 1904.

Sworn and subscribed to before me this 24th day of February, 1904.

(Signed) F. SAMSON, *Clerk.*

Witnesses: ADRIANO MORTIGA.
BERNARDO MORTIGA.
EULALIO MORTIGA.
PLACIDO SOLANO.
CASIMIRA MARIAS.

tion for a rehearing, styled an exception, was made, in which it was insisted that it was the duty of the court to consider the assignment based on the insufficiency of the complaint, since not to do so would be a denial of due process of law. The rehearing was refused, and the sentence imposed below was increased to three years, six months and twenty-nine days, on the ground that this was the minimum punishment provided for the offense.

The errors assigned on this writ of error and the propositions urged at bar to support them are confined to the assertion that the refusal of the court below to consider the assignment of error concerning the insufficiency of the complaint amounted to a conviction of the accused without informing them of the nature and character of the offense with which they were charged, and was besides equivalent to a conviction without due process of law. It is settled that by virtue of the bill of rights enacted by Congress for the Philippine Islands, (32 Stat. 691, 692,) that guarantees equivalent to the due process and equal protection of the law clause of the Fourteenth Amendment, the twice in jeopardy clause of the Fifth Amendment, and the substantial guarantees of the Sixth Amendment, exclusive of the right to trial by jury, were extended to the Philippine Islands. It is further settled that the guarantees which Congress has extended to the Philippine Islands are to be interpreted as meaning what the like provisions meant at the time when Congress made them applicable to the Philippine Islands. (*Kepner* v. *United States*, 195 U. S. 100.)

For the purpose, therefore, of passing on the errors assigned we must test the correctness of the action of the court below by substantially the same criteria which we would apply to a case arising in the United States and controlled by the bill of rights expressed in the amendments to the Constitution of the United States. Turning to the text of the articles of the Philippine penal code upon which the prosecution was based, it will be seen that an essential ingredient of the crime of adultery, as therein defined, is knowledge on the part of the man charged of the fact that the woman with whom the adultery was committed was a married woman. Turning to the complaint upon which the prosecution was begun, it will be at once seen that it was deficient, because it did not specify the place where the crime was committed, nor does it expressly state that Vicente Serra, the accused man, knew that Maria Obleno, the woman accused, was at the time of the guilty cohabitation a married woman. It results that there were deficiencies in the complaint which, if raised in any form in the trial court before judgment, would have required the trial court to hold that the complaint was inadequate. But the question for decision is not whether the complaint, which was thus deficient, could have been sustained, in view of the constitutional guarantees, if a challenge

as to its sufficiency had been presented in any form to the trial court before final judgment, but whether, when no such challenge was made in the trial court before judgment, a denial of the guarantees of the statutory bill of rights arose from the action of the appellate court in refusing to entertain an objection to the sufficiency of the complaint because no such ground was urged in the trial court. Thus reducing the case to the real issue enables us to put out of view a number of decisions of this court referred to in the margin,* as well as many decided cases of State courts referred to in the brief of counsel, because they are irrelevant, since all the former and, if not all, certainly all of the latter, concern the soundness of objections made in the trial court, by the accused, to the sufficiency of indictments or informations.

In *Ex parte Parks*, (93 U. S. 18,) the case was this: The petitioner Parks applied to this court for a writ of *habeas corpus*. He had been convicted and sentenced for the crime of forgery in a District Court of the United States. The ground relied upon for release was that the indictment stated no offense. The writ was discharged. Speaking through Mr. Justice Bradley, it was said:

"But the question whether it was not a crime within the statute was one which the District Court was competent to decide. It was before the court and within its jurisdiction.

* * * * * *

"Whether an act charged in an indictment is or is not a crime by the law which the court administers [in this case the statute law of the United States], is a question which has to be met at almost every stage of criminal proceedings; on motions to quash the indictment, on demurrers, on motions to arrest judgment, etc. The court may err, but it has jurisdiction of the question. If it errs, there is no remedy, after final judgment, unless a writ of error lies to some superior court, and no such writ lies in this case."

In *United States* v. *Ball*, (163 U. S. 662,) an attempt was made to prosecute for the second time one Millard H. Ball, who had been acquitted upon a defective indictment, which had been held bad upon the proceedings in error prosecuted by others, who had been convicted and who had been jointly prosecuted with Ball. Reversing the court below, the plea of *autrefois acquit*, relied on by Ball, was held good. It was pointed out that the acquittal of Ball upon the defective indictment was not void, and, therefore, the acquittal on such an indictment was a bar. This case was approvingly cited in *Kepner* v. *United States*, (195 U. S. 100, 129.) It being then settled that the conviction on a defective indictment is not void, but presents a mere question of error to be reviewed according to law, the

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* United States *v.* Cook, 17 Wall. 168, 174; United States *v.* Carll, 105 U. S. 611; Dunbar *v.* United States, 156 U. S. 185; Cochran & Sayres *v.* United States, 157 U. S. 286; Markham *v.* United States, 160 S. 319.

proposition to be decided is this, Did the court below err in holding that it would not consider whether the trial court erred because it had not decided the complaint to be bad, when no question concerning its sufficiency was either directly or indirectly made in that court? Thus to understand the proposition is to refute it. For it cannot be that the court below was wrong in refusing to consider whether the trial court erred in a matter which that court was not called upon to consider and did not decide. Undoubtedly, if a judgment of acquittal had resulted it would have barred a further prosecution, despite the defective indictment. (*Kepner* v. *United States, supra.*)

But it is said the peculiar powers of the Supreme Court in the Philippine Islands take this case out of the general rule, since in that court on appeal a trial *de novo* is had even in a criminal case. But as pointed out in the Kepner case, whilst that court on appeal has power to re-examine the law and facts, it does so on the record and does not retry in the fullest sense. Indeed, when the power of the court below to review the facts is considered that power, instead of sustaining, refutes the proposition relied on. Thus the proposition is that the court should have reversed the conviction because of the contention as to the insufficiency of the complaint, when no such question had been raised before final judgment in the trial court, and when, as a necessary consequence of the facts found by the court, the testimony offered at the trial without objection or question in any form established every essential ingredient of the crime. In other words, the contention is that reversal should have been ordered for an error not committed and when the existence of injury was impossible to be conceived, in view of the opinion which the court formed on the facts in the exercise of the authority vested in it on that subject.

Affirmed.

Mr. Justice HARLAN dissents.

True copy.

Test:

Clerk Supreme Court U. S.